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1316

United States

1316

Circuit Court of Appeals

For the Ninth Circuit.

CHINA MAIL STEAMSHIP COMPANY, LIMITED, a Corporation, Owner and Claimant of the Steamship "NANKING," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Territory of Hawaii.

FILED

MAY 29 1922

F. D. MONCKTON,
CLERK.



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United States
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For the Ninth Circuit.

CHINA MAIL STEAMSHIP COMPANY, LIMITED, a Corporation, Owner and Claimant of the Steamship "NANKING," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Libellant: THE UNITED STATES OF AMERICA,

S. C. HUBER, Esq., United States District Attorney, Honolulu, Hawaii.

For Libellee: THE STEAMSHIP "NANKING," Her Engines, etc.

Messrs. SMITH, WARREN & STANLEY.

For Claimant: CHINA MAIL STEAMSHIP COMPANY, LIMITED.

Messrs. SMITH, WARREN & STANLEY.

[1*]

In the District Court of the United States for the Territory of Hawaii.

No. 204.

THE UNITED STATES OF AMERICA,

Libellant,

vs.

The Steamship "NANKING," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Libellee.

CHINA MAIL STEAMSHIP COMPANY, LIMITED,

Owner and Claimant.

*Page-number appearing at foot of page of original certified Apostiles on Appeal.

Statement Under Admiralty Rule 4.

TIME OF COMMENCING SUIT:

July 2, 1921: Verified libel was filed and monition issued to the United States Marshal for the District of Hawaii.

NAMES OF ORIGINAL PARTIES:

Libellant: United States of America.

Libellee: The Steamship "Nanking," her Engines, etc.

Claimant: China Mail Steamship Co., Ltd., became party before appeal.

DATES OF FILING OF PLEADINGS:

July 2, 1921: Libel.

October 28, 1921: Answer of Claimant.

SERVICES OF PROCESS:

July 2, 1921: Monition was issued and delivered to the United States Marshal.

July 6, 1921: Discontinuance filed by United States Attorney, no return made by U. S. Marshal upon monition heretofore issued. [2]

TIME WHEN PROCEEDINGS WERE HAD:

September 16, 1921: Proceedings on motion to set aside discontinuance.

Septemebr 21, 1921: Proceedings at decision on motion to set aside discontinuance.

October 26, 1921: Opinion on motion to set aside discontinuance.

November 17, 1921: Opinion on exceptions to answer to libel.

November 17, 1921: Final decree filed and entered.

November 26, 1921: Notice of appeal.

December 5, 1921: Bond on appeal.

Proceedings had before The Honorable HORACE W. VAUGHAN, District Judge.

Certificate of Clerk U. S. District Court to Statement Under Admiralty Rule 4.

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto and those who have become parties before the appeal, the several dates when the respective pleadings were filed; an account of the service of process herein, the time when proceedings were had and the name of the Judge presiding; the date of the filing and entering of the final decree and the date when the notice of appeal was filed in the case of The United States of America, Libellant, vs. The Steamship "Nanking," Her Engines, etc., Libellee, and China Mail Steamship Co., Ltd., Owner and Claimant, Admiralty Number 204, in the United States District Court of the Territory of Hawaii. [3]

In Witness Whereof, I have hereunto set my hand

4 *China Mail Steamship Company, Limited,*
and affixed the seal of said District Court, this 5th
day of April, A. D. 1922.

[Seal] WM. L. ROSA,
Clerk, United States District Court, Territory of
Hawaii. [4]

In the United States District Court of the Territory of Hawaii. The United States of America, Libellant, vs. The Steamship "Nanking," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Libellee. Libel in Rem Against the Steamship "Nanking." Filed Jul. 2, 1921, at two o'clock and — minutes, — M. (S.) Wm. L. Rosa, Clerk. By —, Deputy Clerk. S. C. Huber, United States Attorney. N. D. Godbold, Assistant United States Attorney. [5]

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Libellant,

VS.

The Steamship "NANKING," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Libellee.

Libel in Rem Against the Steamship "Nanking."
To the Honorable HORACE W. VAUGHAN and
the Honorable JOSEPH B. POINDEXTER,
Judges of the United States District Court:
The libel of information by S. C. Huber, United

States Attorney for the District of Hawaii, who prosecutes for the said United States in this behalf, and being present here in court in his own proper person, in the name and on behalf of the said United States against the steamship "Nanking," her engines, boilers, machinery, apparel and furniture, in a cause of seizure alleges and informs as follows:

FIRST COUNT.

1. That by an Act of Congress of the United States of America, approved February 5, 1917, entitled "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was, among other things, provided as follows:

"Sec. 10. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other [6] than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by

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both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

2. That after the passage of said Act, to wit, during the months of January and February, A. D. 1921, the said "Nanking" was a common carrier of passengers operating by steam power between the ports of Hongkong, China, and San Francisco, California; that on the 1st day of February, 1921, there was being carried and transported from Hongkong, China, to Mazatlan, Mexico, via San Francisco, California, as a passenger, on the said "Nanking," one Jesus Wong, who was an alien, the said Jesus Wong being then and there a subject of the Republic of China.

3. That from about 4:10 o'clock P. M. of the 1st day of February, 1921, to about 2 o'clock A. M. of the 2d day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and the said Jesus Wong was then and there a passenger on the said "Nanking" having theretofore taken passage on said "Nanking" at the port of Hongkong, in the Republic of China; that the owners, officers and agents of the said "Nanking" were then and there charged with the

duty to prevent the landing of the said Jesus Wong at the port of Honolulu aforesaid.

4. That while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said Jesus Wong did land in the United States at the port of Honolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not prevent the said [7] Jesus Wong from then and there landing in the United States and did unlawfully permit the said Jesus Wong to land at said Honolulu aforesaid, at the time aforesaid.

5. That at the time said Jesus Wong landed at Honolulu as aforesaid said port of Honolulu had not been designated by any immigration officer of the United States where the said Jesus Wong might land at the time said "Nanking" was docked at said port of Honolulu on said 1st and 2d days of February, 1921, as aforesaid, and authority had not been given to the said Jesus Wong nor to any of the owners, officers or agents of the said "Nanking" to permit the said Jesus Wong to then and there land at said Honolulu aforesaid.

6. That in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the unlawful landing of the said Jesus Wong in the United States as aforesaid.

7. That the said "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, then and there, by virtue of the premises and the said Act of Congress above referred to, became and is now

8 *China Mail Steamship Company, Limited,*

subject to the penalty of one thousand dollars (\$1000) provided by the said Act of Congress.

8. That all and singular the premises aforesaid are true and within the admiralty and marine jurisdiction of the United States and of this Honorable Court. [8]

For another and different cause of seizure against said steamship "Nanking" said S. C. Huber, United States District Attorney, alleges and informs as follows:

SECOND COUNT.

1. That by an Act of Congress of the United States of America, approved February 5, 1917, entitled, "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was, among other things, provided as follows:

"Sec. 10. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and

on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

2. That, after the passage of said Act, to wit, during the months of January and February, A. D. 1921, the said "Nanking" was a common carrier of passengers operating by steam power between the ports of Hongkong, China, and San Francisco, California; that on the 1st day of February, 1921, there was being carried and transported from Hongkong, China, to Mazatlan, Mexico, via San Francisco, California, as passenger, on the said "Nanking," one Manuel Chan, who was an alien, the said Manuel Chan being then and there a subject of the Republic of China. [9]

3. That from about 4:10 o'clock P. M. of the 1st day of February, 1921, to about 2 o'clock A. M. of the 2d day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and the said Manuel Chan was then and there a passenger on the said "Nanking" having theretofore taken passage on said "Nanking" at

10 *China Mail Steamship Company, Limited,*

the port of Hongkong, in the Republic of China; that the owners, officers and agents of the said "Nanking" were then and there charged with the duty to prevent the landing of the said Manuel Chan at the port of Honolulu aforesaid.

4. That while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said Manuel Chan did land in the United States at the port of Honolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not prevent the said Manuel Chan from then and there landing in the United States and did unlawfully permit the said Manuel Chan to land at said Honolulu aforesaid, at the time aforesaid.

5. That at the time said Manuel Chan landed at Honolulu as aforesaid said port of Honolulu had not been designated by any immigration officer of the United States as a place in the United States where the said Manuel Chan might land at the time said "Nanking" was docked at said port of Honolulu on said 1st and 2d days of February, 1921, as aforesaid, and authority had not been given to the said Manuel Chan nor to any of the owners, officers or agents of the said "Nanking" to permit the said Manuel Chan to then and there land at said Honolulu aforesaid.

6. That in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the unlawful landing of the said Manuel Chan in the United States as aforesaid. [10]

7. That the said "Nanking," her engines,

boilers, machinery, tackle, apparel and furniture, then and there, by virtue of the premises and the said Act of Congress above referred to, became and is now subject to the penalty of one thousand dollars (\$1000) provided by the said Act of Congress.

8. That all and singular the premises aforesaid are true and within the admiralty and marine jurisdiction of the United States and of this Honorable Court. [11]

For another and different cause of action against said steamship "Nanking" said S. C. Huber, United States Attorney, alleges and informs as follows:

THIRD COUNT.

1. That by an Act of Congress of the United States of America, approved February 5, 1917, entitled, "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was, among other things, provided as follows:

"Sec. 10. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the fore-

going requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

2. That, after the passage of said Act, to wit, during the months of January and February A. D. 1921, the said "Nanking" was a common carrier of passengers operating by steam power between the ports of Hongkong, China, and San Francisco, California; that on the 1st day of February, 1921, there was being carried and transported from Hongkong, China, to Mazatlan, Mexico, via San Francisco, California, as a passenger, on the said "Nanking," one Ramon Chon, who was an alien, the said Ramon Chon being then and there a subject of the Republic of China. [12]

3. That from about 4:10 o'clock P. M. of the 1st day of February, 1921, to about 2 o'clock A. M. of the 2d day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and the said Ramon Chon was then and there a passenger on the said "Nanking"

having theretofore taken passage on said "Nanking" at the port of Hongkong, in the Republic of China; that the owners, officers and agents of the said "Nanking" were then and there charged with the duty to prevent the landing of the said Ramon Chon at the port of Honolulu aforesaid.

4. That while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said Ramon Chon did land in the United States at the port of Honolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not prevent the said Ramon Chon from then and there landing in the United States and did unlawfully permit the said Ramo Chon to land at said Honolulu aforesaid, at the time aforesaid.

5. That at the time said Ramon Chon landed at Honolulu as aforesaid, said port of Honolulu had not been designated by any immigration officer of the United States as a place in the United States where the said Ramon Chon might land at the time said "Nanking" was docked at said port of Honolulu on said 1st and 2d days of February, 1921, as aforesaid, and authority had not been given to the said Ramon Chon nor to any of the owners, officers or agents of the said "Nanking" to permit the said Ramon Chon to then and there land at said Honolulu aforesaid.

6. That in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nan-

14 *China Mail Steamship Company, Limited,*
king" for the unlawful landing of the said Ramon Chon in the United States as aforesaid. [13]

7. That the said "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, then and there, by virtue of the premises and the said Act of Congress above referred to, became and is now subject to the penalty of one thousand dollars (\$1000) provided by the said Act of Congress.

8. That all and singular the premises aforesaid are true and within the admiralty and marine jurisdiction of the United States and of this Honorable Court. [14]

For another and different cause of seizure against said steamship "Nanking" said S. C. Huber, United States Attorney, alleges and informs as follows:

FOURTH COUNT.

1. That by an Act of Congress of the United States of America, approved February 5, 1917, entitled, "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was, among other things, provided as follows:

"Sec. 10. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of

such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

2. That, after the passage of said Act, to wit, during the months of January and February, A. D. 1921, the said "Nanking" was a common carrier of passengers operating by steam power between the ports of Hongkong, China, and San Francisco, California; that on the 1st day of February, 1921, there was being carried and transported from Hongkong, China, to Mazatlan, Mexico, via San Francisco, California, as a passenger, on the said "Nanking," one Joaquin Lam, who was an alien, the said Joaquin Lam being then and there a subject of the Republic of China. [15]

3. That from about 4:10 o'clock P. M. of the 1st day of February, 1921, to about 2 o'clock A. M.

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of the 2d day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and the said Joaquin Lam was then and there a passenger on the said "Nanking," having theretofore taken passage on said "Nanking" at the port of Hongkong, in the Republic of China; that the owners, officers and agents of the said "Nanking" were then and there charged with the duty to prevent the landing of the said Joaquin Lam at the port of Honolulu aforesaid.

4. That while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said Joaquin Lam did land in the United States at the port of Honolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not prevent the said Joaquin Lam from then and there landing in the United States and did unlawfully permit the said Joaquin Lam to land at said Honolulu aforesaid, at the time aforesaid.

5. That at the time said Joaquin Lam landed at Honolulu as aforesaid, said port of Honolulu had not been designated by any immigration officer of the United States as a place in the United States where the said Joaquin Lam might land at the time said "Nanking" was docked at said port of Honolulu on said 1st and 2d days of February, 1921, as aforesaid, and authority had not been given to the said Joaquin Lam nor to any of the owners, officers or agents of the said "Nanking" to permit the said Joaquin Lam to then and there land at said Honolulu aforesaid.

6. That in the opinion of the Secretary of

Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the unlawful landing of the said Joaquin Lam in the United States as aforesaid.

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7. That the said "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, then and there, by virtue of the premises and the said Act of Congress above referred to, became and is now subject to the penalty of one thousand dollars (\$1000) provided by the said Act of Congress.

8. That all and singular the premises aforesaid are true and within the admiralty and marine jurisdiction of the United States and of this Honorable Court.

WHEREFORE, the said S. C. Huber, United States Attorney for the District of Hawaii, on behalf of the said United States, prays the usual process and monition against the said steamship "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, in this behalf to be made, and that all persons interested in said "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, may be cited to appear and answer the premises, and that this Honorable Court may be pleased to decree for the penalties aforesaid and that the said "Nanking" may be condemned and sold to pay the several penalties aforesaid, with costs, and for such other and further relief as shall to law and justice appertain.

(Sgd.) S. G. HUBER,
United States Attorney. [17]

The United States of America,
Territory of Hawaii,—ss.

S. C. Huber, being first duly sworn according to law, deposes and says:

That he is the United States District Attorney in and for the Territory and District of Hawaii; that he has read the foregoing petition and knows the contents thereof and that the facts therein stated he believes to be true.

(Sgd.) S. C. HUBER.

Subscribed and sworn to before me this 2d day of July, A. D. 1921.

(Sgd.) WM. L. ROSA,
Clerk United States District Court, Territory of Hawaii.

Order Directing Issuance of Process.

Now, to wit, on this 2d day of July, 1921, libel herein having been presented and the Court being duly advised in the premises, hereby orders and directs that process issue as prayed in said libel.

(Sgd.) HORACE W. VAUGHAN,
Judge United States District Court, Territory of Hawaii. [18]

In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. The United States of America, Libellant, vs. The Steamship "Nanking," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Libellant.

Answer of Claimant. Filed October 28, 1921.
(Sgd.) Wm. L. Rosa, Clerk. Smith, Warren &
Stanley, Proctors for Claimant.

Received a copy of the within answer this 28th
day of October, 1921.

(Sgd.) S. C. HUBER,
United States District Attorney. [19]

In the District Court of the United States for the
Territory of Hawaii.

IN ADMIRALTY—IN REM.

ADM.—No. 204.

THE UNITED STATES OF AMERICA,
Libellant,

vs.

The Steamship “NANKING,” Her Engines, Boilers,
Machinery, Tackle, Apparel and Furni-
ture,

Libellee.

Answer of Complaint.

To the Honorable HORACE W. VAUGHAN, Judge
of the United States District Court for the
Territory of Hawaii:

Now comes the China Mail Steamship Company,
Limited, a corporation, the owner and claimant
herein of the above-named steamship “Nanking,”
her engines, boilers, machinery, tackle, apparel and
furniture, libellee in the above-entitled cause, and
by leave of Court obtained, makes this its answer
unto the libel on file herein, and to the four several
counts thereof as follows:

I.

Claimant admits the matter alleged in paragraphs 1 and 2 of each of the four several counts of said libel.

II.

Answering the allegations made in paragraph 3 of each of [20] the said several counts of said libel, claimant admits that from about 4:10 o'clock P. M. of the 1st day of February, 1921, to about 2 o'clock A. M. of the 2d day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and that the four alien passengers in said several counts separately named, to wit, Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam, were then and there passengers on the said "Nanking," each having theretofore taken passage on said "Nanking" at the port of Hongkong, in the Republic of China; but claimant denies the conclusion of law in each of said paragraphs 3 further made, inferred and alleged that the owners, officers and agents of the said "Nanking" were then and there charged with the duty to prevent the landing of the said four alien passengers (and each of them) at the port of Honolulu aforesaid; although claimant admits that the owners, officers and agents of the said "Nanking" were then and there required to exercise all due and reasonable care and diligence and do all that reasonably lay within their power to prevent the landing of said passengers at said port of Honolulu.

III.

Answering the allegations made in paragraph 4 of each of said several counts of said libel, claimant admits that while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam did land in the United States at the port of Honolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not in fact prevent them or any of them from then and there landing in the United States; but claimant denies the conclusion of law in each of said paragraphs further made and alleged that [21] the owners, officers and agents of the said "Nanking" (or any of them) did unlawfully permit said passengers to land at said port of Honolulu at the time aforesaid.

IV.

Claimant admits the matter separately alleged in paragraph 5 in each of said several counts of said libel.

V.

Claimant leaves libellant to its proof of the matters alleged in paragraph 6 of each of said several counts of said libel.

VI.

Answering paragraph 7 in each of said several counts of said libel, claimant denies that the said "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, then and there, by virtue of the premises and the said Act of Congress therein referred to, became and is now sub-

ject to the penalty of one thousand dollars (\$1000) in each of said cases provided by said Act of Congress.

VII.

And said claimant, further answering all and singular the matters alleged in said libel and in each of the said several counts thereof, says that it has a good and meritorious defense to the several claims set forth in said libel, to wit:

That the said four alien passengers escaped from the said vessel against the will and intent of the owner, officers and agents of the vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said alien Chinese from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other [22] officers and the owner of said vessel to prevent any passengers on said vessel from leaving said vessel, and none in fact did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigration at Honolulu, and that no alien or Chinese passengers did in fact leave said vessel over said gangway without exhibiting such pass; and claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and

properly issued by the United States Inspector of Immigration at said Honolulu, and approved by Castle & Cooke, Limited, (the then agents for said steamship company), to Chinese residents of Honolulu having lawful business on the vessels of said steamship company, which fraudulent use consisted in one or more of said passes (either with or without the connivance of the legitimate holders thereof therein named) having been given to one or more persons holding his or their own proper pass or passes, who took such other passes on board the vessel and there gave such other passes to the several Chinese who escaped, thereby enabling said escaping Chinese to use said passes as though their own, by falsely impersonating the person named in such pass, with the aid of wearing some article or articles of wearing apparel theretofore surreptitiously furnished to them by conniving friends or agents and bearing some mark denoting the origin or purchase thereof in Honolulu, thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in a manner beyond the power [23] of said steamship company to have anticipated and prevented; and also, as claimant is informed and believes, and proposes to prove in this cause, passes or permits were occasionally made out by the Inspector of Immigration at Honolulu for more than one person for Chinese of Honolulu desiring to visit on board vessels in port and it would therefore be possible and easily practicable for such passes to be used by one or more persons less

than the whole number of persons mentioned therein in boarding any vessel and then used to pass from the ship by the full number of persons therein mentioned; and that on February 1, 1921, while said steamship "Nanking" was in port at Honolulu, Chinese visiting them from Honolulu did board said vessel, over the regular gangway with passes issued by said Immigration Inspector, and, while claimant cannot allege or prove with certainty that any such double passes were in fact then used, claimant nevertheless alleges that the existence of such a situation would render possible the illegal landing of alien passengers, notwithstanding all efforts of the steamship company to prevent the same.

VIII.

That in so far as section 10 of Chapter 29 of the Act of February 5, 1917, relating to Immigration assumes or may be construed to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the Immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any [24] knowledge thereof, the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.

WHEREFORE, claimant prays that said libel be dismissed, and that the bond herein given by and on

behalf of the claimant to answer whatever decree shall be made and entered in this cause against said vessel be discharged.

Dated, Honolulu, Hawaii, October 28th, 1921.

CHINA MAIL STEAMSHIP COMPANY,
LIMITED,

By FRED L. WALDRON, LIMITED,
Its Honolulu Agent,

By (Sgd.) FRED L. WALDRON,
President.

SMITH, WARREN & STANLEY,
Proctors for Claimant.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

L. J. Warren, being first duly sworn, deposes and says: That he is a member of the law firm of Smith, Warren & Stanley, proctors for the China Mail Steamship Company, Limited (a corporation), the claimant in the foregoing entitled cause; that said claimant has no officer or personal agent within the Territory of Hawaii, for which reason this verification is made by affidavit on its behalf; and affiant by reason of having personally investigated the matters and things involved in the issues in this cause and interviewed witnesses with regard thereto, now says that he has prepared the foregoing answer of said claimant to the libel in said cause and knows the contents thereof and that the facts therein stated he believes to be true.

(Sgd.) L. J. WARREN.

Subscribed and sworn to before me this 28th day
of October, 1921.

[Seal] (Sgd.) ANNA EDMONDS,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [25]

In the United States District Court, in and for the
Territory of Hawaii. The United States of
America, Libellant, vs. The Steamship "Nanking,"
etc., Libellee. Exceptions to Answer to Libel.
Filed Nov. 8, '21. (Sgd.) Wm. L. Rosa, Clerk.
S. C. Huber, United States Attorney.

Due and legal service of the within exceptions
to answer to libel is hereby accepted and receipt
of a copy thereof acknowledged this 8th day of
November, 1921.

(Sgd.) SMITH, WARREN & STANLEY,
Proctors for Libellee. [26]

In the United States District Court, in and for the
Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Libellant,
vs.

The Steamship "NANKING," etc.,
Libellee.

Exceptions to Answer to Libel.

To the Honorable HORACE W. VAUGHAN and the Honorable JOSEPH B. POINDEXTER, Judges of the United States District Court for Hawaii:

The above-named libellant hereby excepts to the answer filed in the above-entitled cause by the owner and claimant, China Mail Steamship Company, Limited, for that said answer is insufficient and contemptuous and does not constitute any defense to said libel for the following reasons:

1. That said answer does not deny any material allegation of said libel.
2. That said answer, in Articles I, II, III and IV, thereof, admits all of the material allegations of said libel and of each and every count thereof.
3. That the allegations of Article VII of said answer that "claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and properly issued by the United States Inspector of Immigration at said Honolulu, and approved by Castle & Cooke, [27] Limited (the then agents for said Steamship Company), to Chinese residents of Honolulu having lawful business on the vessels of said Steamship Company" and that "none, in fact, did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel," are irrelevant and contemptuous,

and that neither said facts quoted above, nor any facts alleged in said Article VII. are relevant, nor do said facts, or any of them, constitute a defense to said libel.

4. That the allegations of Article VIII of said answer are wholly insufficient and state no facts upon which to base and sustain the claim that Section 10, Chapter 29, of the Act of February 5, 1917, is illegal and unconstitutional, and that the allegations of said Article VIII state only the conclusion of the pleader.

WHEREFORE, libellant asks for judgment as prayed in his libel and in each and every count thereof.

(Sgd.) S. C. HUBER,
United States Attorney,
Proctor for Libellant. [28]

In the United States District Court for the Territory of Hawaii. In Admiralty. In Rem. The United States of America, Libellant, vs. The Steamship "Nanking," etc., Libellee. Decision on Exceptions to Answer. Filed Nov. 16, 1921, at — o'clock and — minutes — M. (S.) Wm. L. Rosa, Clerk. By _____, Clerk. S. C. Huber, United States Attorney, for the Libellant. Smith, Warren & Stanley, Proctors for Libellee. Horace W. Vaughan, Judge. [29]

In the United States District Court for the Territory of Hawaii.

IN ADMIRALTY—IN REM.

THE UNITED STATES OF AMERICA,

Libellant,

vs.

The Steamship “NANKING,” etc.,

Libellee.

Decision on Exceptions to Answer.

On July 2, 1921, the United States Attorney filed in this court libel in rem against the steamship “Nanking,” seeking to recover four penalties of \$1000 each provided by Section 10 of the Act of February 5, 1917, chapter 29, Immigration Act.

The libel contains four separate counts, and in each count the owner, master, officers and agents of said vessel are charged with a separate violation of the act referred to, on the 1st of February, 1921, in having failed to prevent the person therein named, alleged to have been then and there an alien passenger on said vessel, from landing in the United States at said time and place, and thereby permitting him unlawfully to land in the United States at said time and place.

The claimant’s answer admits the jurisdictional facts stated in paragraphs 1 and 2 of each count of the libel, including the fact of the presence on board of the aliens therein named, as passengers bound from Hongkong, China, to Mazatlan,

Mexico, and that these aliens did in fact leave the "Nanking" at the port of Honolulu, without any lawful authority having been given for them so to land, and claimant further admits that the owners, officers and agents of the vessel "did not [30] in fact prevent" said aliens from landing in the United States, but denies that they or any of them did "unlawfully permit" said passengers to land, and further denies that it was their duty, absolutely, "to prevent" the landing of said passengers; and the claimant, further answering the counts of the libel, collectively, says that it has a good and meritorious defense to the several claims of the libel, as follows:

"That the said four alien passengers escaped from the said vessel against the will and intent of the owner, officers and agents of said vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said alien Chinese from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any passengers on said vessel from leaving said vessel, and none in fact did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the In-

spector of Immigration at Honolulu, and that no alien or Chinese passenger did in fact leave said vessel over said gangway without exhibiting such pass; and claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and properly issued by the United States Inspector of Immigration at said Honolulu, and approved by Castle & Cooke, Limited, (the then agents for said Steamship Company) to Chinese residents of Honolulu having lawful business on the vessels of said Steamship Company, which fraudulent use consisted in one or more of said passes (either with or without the connivance of the legitimate holders thereof therein named) having been given to one or more persons holding his or their own proper pass or passes, who took such other passes on board the vessel and there gave such other passes to the several Chinese who escaped, thereby enabling said escaping Chinese to use said passes as though their own, by falsely impersonating the person named in such pass, with the aid of wearing some article or articles of wearing apparel theretofore surreptitiously furnished to them by conniving friends or agents and bearing some mark denoting the origin or purchase thereof in Honolulu, thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gang-

way of the vessel as Honolulu residents and in a manner beyond the power of said Steamship Company to have anticipated and prevented; and also, as claimant is informed and believes, and proposes to prove in this cause, passes or permits were occasionally made out by the Inspector of Immigration at Honolulu for more than one person, for Chinese of Honolulu desiring to visit on board vessels in port, and it would therefore be possible and easily practicable for such passes to be used by one or more persons less than [31] the whole number of persons mentioned therein in boarding any vessel and then used to pass from the ship by the full number of persons therein mentioned; and that on February 1, 1921, while said Steamship 'Nanking' was in port at Honolulu, Chinese visiting them from Honolulu did board said vessel, over the regular gangway, with passes issued by said Immigration Inspector, and, while claimant cannot allege or prove with certainty that any such double passes were in fact then used, claimant nevertheless alleges that the existence of such a situation would render possible the illegal landing of alien passengers, notwithstanding all efforts of the Steamship Company to prevent the same."

As a separately stated defense, the claimant sets up the alleged unconstitutionality of Section 10 of the act referred to, in the following language:

“That in so far as Section 10 of Chapter 29 of the Act of February 5, 1917, relating to Immigration assumes or may be construed to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the immigration officers, notwithstanding the exercise by them of all due and reasonable care and effort to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof, the same is unreasonable, harsh, and oppressive, and is illegal and unconstitutional.”

The Court holds that the Act in question is constitutional.

The Court further holds that the answer fails to disclose a meritorious defense. For the reasons set forth in the opinion of the Court in *United States vs. The Steamship “Makura,”* March 1, 1920, the Court is of the opinion that “vessels bringing aliens to seaports and failing to prevent their landing at places other than those designated by the immigration officials, are subject to the penalty denounced by the section of the act referred to; that the duty to prevent such aliens from landing at any place other than that designated by the immigration officials is made absolute by the statute, and that the various changes made in the statute on the subject

indicate that Congress intended to make such duty absolute.” [32]

The exceptions are therefore sustained, and, unless the claimant shall amend its answer within ten days from the date hereof, a decree may be entered for the libellant according to the prayer of the libel.

(Sgd.) HORACE W. VAUGHAN,
Judge U. S. District Court, Territory of Hawaii.

Dated at Honolulu, T. H., this 16th day of November, 1921. [33]

In the United States District Court, in and for the Territory of Hawaii. The United States of America, Libellant, vs. The Steamboat “Nanking,” etc., Libellee. No. 204. Decree. Entered in Judgment Book, Folio No. 2793a. Filed Nov. 17, 1921. (S.) Ritchie G. Rosa, Deputy Clerk. S. C. Huber, United States Attorney. [34]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Libellant,
vs.

The Steamship “NANKING,” etc.,
Libellee.

Decree.

This cause having come on regularly before the Honorable Horace W. Vaughan, a Judge of this court, upon the pleadings filed by the respective

parties, and the Court, having sustained libellant's exceptions to claimant's answer, as shown by decision rendered and filed on the 16th day of November, A. D. 1921, and claimant having, in open court, elected not to amend its answer or plead further but to stand on its answer as filed, the Court therefore finds that the steamboat "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, are liable to a penalty in the sum of four thousand dollars (\$4000) to be paid to the United States of America, libellant:

NOW, THEREFORE, upon motion of S. C. Huber, United States Attorney, proctor for said libellant, it is hereby ordered, adjudged and decreed that the libellant, United States of America, do have and recover from said libellee, the steamboat "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, and that said respondents pay to said libellant accordingly the sum of four thousand dollars (\$4000), in lawful money of the United States, with interest thereon from the date thereof until [35] paid at the rate of six (6) per cent per annum, together with all the costs of this action, which are hereby taxed in the sum of \$8.25.

And it further appearing to the Court that the said steamboat "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, have been released to the China Mail Steamship Company, Limited, owner and claimant in this cause, upon a bond for value in the sum of eight thousand dollars (\$8,000), dated the 28th day of October, A. D.

1921, signed by Fred L. Waldron, Limited, agents for said China Mail Steamship Company, Limited, on behalf of the owners of said steamboat "Nanking," with Fred L. Waldron and L. Tenney Peck as sureties, conditioned that said principal and sureties shall abide by and perform the decree of this court; and on the 17th day of Aug., 1921, said owner and claimant filed stipulation for costs in the sum of \$500 with the United States Fidelity & Guaranty Company as surety.

It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that unless said decree (including costs) shall be satisfied, or proceedings thereon stayed by appeal, within ten (10) days after notice given by the proctor for said libellant to Smith, Warren & Stanley, proctors for said respondent and said claimant, of the entry of this decree and the taxation of costs herein, the said sureties, Fred L. Waldron, L. Tenney Peck and United States Fidelity & Guaranty Company, pay to said libellant the said sum of four thousand dollars (\$4,000) hereinabove awarded as aforesaid, with interest thereon to the date of payment, and the libellant's costs taxed as aforesaid, or show cause within five (5) days after the expiration of said period of ten (10) days why execution should not issue against them, their lands goods and chattels, [36] according to said bond and stipulation, to satisfy this decree. In the event of proceedings hereunder being stayed by appeal, the obligation of said sureties under said bond and stipulation shall be suspended, to satisfy such decree as shall or may

be finally made herein upon mandate on appeal; and upon payment of said sum of four thousand dollars (\$4,000) and costs (or as may be directed by any final decree upon mandate in case of an appeal), the said sureties shall stand released from further liability on account of the said stipulation.

Dated: Honolulu, T. H., November 17th, 1921.

(Sgd.) HORACE W. VAUGHAN,
Judge of the United States District Court for the
Territory of Hawaii.

Approved as to form and as to signing by Judge Vaughan.

(Sgd.) S. C. HUBER,
Proctor for Libellant.

(Sgd.) SMITH, WARREN & STANLEY,
Proctors for Libellee and Claimant. [37]

Adm. No. 204. In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. The United States of America, Libellant, vs. The Steamship "Nanking," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Libellee, and China Mail Steamship Company, Limited, Owner and Claimant. Notice of Appeal. Filed Nov. 26, 1921. Wm. L. Rosa, Clerk. By (S.) Ritchie G. Rosa, Deputy. Smith, Warren & Stanley, Attorneys at Law, 205 Bank of Hawaii Bldg., Honolulu, T. H., Proctors for Libellee.

Received a copy of the within Notice of Appeal
this 26th day of November, 1921.

(S.) S. C. HUBER,
United States District Attorney, Proctor for Libel-
lant. [38]

In the District Court of the United States for the
Territory of Hawaii.

IN ADMIRALTY—IN REM.

ADM. No. 204.

THE UNITED STATES OF AMERICA,
Libellant,
vs.

The Steamship “NANKING,” Her Engines,
Boilers, Machinery, Tackle, Apparel and
Furniture,

Libellee,

and

CHINA MAIL STEAMSHIP COMPANY, LIM-
ITED,
Owner and Claimant.

Notice of Appeal.

To the United States of America, Libellant in the
Above-entitled Cause, and to S. C. HUBER,
Esq., United States Attorney, and Proctor for
said Libellant:

You are hereby notified that the steamship “Nan-
king,” her engines, etc., libellee in the above-en-
titled cause, and the China Mail Steamship Com-

pany, Limited, owner and claimant of said vessel, intend to and do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of the United States District Court for the Territory of Hawaii, made and entered in said cause on the 17th day of November, 1921.

Dated, Honolulu, Hawaii, November 26, 1921.

W. O. SMITH,

L. J. WARREN,

W. L. STANLEY,

Proctors for said Libellee and Claimant. [39]

Adm. No. 204. In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. The United States of America, Libellant, vs. The Steamship "Nanking," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Libellee, and China Mail Steamship Company, Limited, Owner and Claimant. Assignment of Errors. Filed January 30, 1922, at 3 o'clock and 55 minutes P. M. Wm. L. Rosa, Clerk. By (S.) Wm. F. Thompson, Jr., Deputy Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 205 Bank of Hawaii Bldg., Honolulu, T. H., Proctors for Libellee.

Received a copy of the within assignment of errors this 30th day of January, 1922.

(Sgd.) S. C. HUBER,

United States District Attorney, Proctor for Libellant. [40]

In the District Court of the United States for the
Territory of Hawaii.

IN ADMIRALTY—IN REM.

ADM. No. 204.

THE UNITED STATES OF AMERICA,
Libellant,
vs.

The Steamship “NANKING,” Her Engines,
Boilers, Machinery, Tackle, Apparel and
Furniture,
Libellee,

and

CHINA MAIL STEAMSHIP COMPANY, LIM-
ITED,

Owner and Claimant.

Assignment of Errors.

Now comes the Steamship “Nanking,” the libellee in the above-entitled cause, and the China Mail Steamship Company, Limited, owner and claimant thereof, and make and file this their assignment of errors in the above-entitled cause on the appeal of said claimant, as follows:

1. The Court erred in its decision that by virtue of the provisions of Section 10 of the Act of Congress of the United States approved February 5, 1917, entitled “An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States,” it was and is the absolute duty of every person, including owners, officers, and

agents of vessels bringing any alien to any seaport of the United States to prevent under all circumstances the landing of such alien in the United States at any time or place other than as designated [41] by the immigration officers, and that the penalties of said section will apply if any such alien has in fact effected an escape from such vessel without the knowledge or consent of the owner, officers, master or agents thereof and notwithstanding such owner, officers, master and agents may have exercised due diligence and taken every reasonable and proper precaution to prevent such unauthorized landing, and notwithstanding such escape may have been effected by means beyond the reasonable power of the said owners, officers, master and agents of the vessel to have anticipated and prevented.

2. The Court erred in its decision that, by virtue of said section 10, it was the absolute duty of the owner, officers and agents of the said steamship "Nanking" to have prevented the aliens named in the libel herein, to wit, Jesus Wong, Manuel Chan, Ramon Chon and Joquin Lam, and each of them, from landing at the port of Honolulu, when it affirmatively appears by paragraph VII of the answer of the claimant herein that the said aliens in fact effected an escape from said vessel against the will and intent of the owner, officers and agents of said vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said aliens from said vessel, and that every

reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any alien passengers from leaving said vessel, and that none did in fact leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by [42] the Inspector of Immigration at Honolulu, and that no alien did in fact leave said vessel over said gangway without exhibiting such pass, and notwithstanding the claimant has by its answer to said libel alleged and offered to prove that the said escapes were effected by the fraudulent and improper use of passes theretofore regularly issued by the United States Inspector of Immigration at Honolulu in the manner in said answer set forth.

3. The Court erred in sustaining exception Number 3 taken and filed to claimant's answer and holding that the matters and things alleged in paragraph VII of claimant's answer as above set forth do not state a defense to said libel.

4. The Court erred in its refusal to find and hold that in so far as the said section 10 purports to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circum-

stances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof, the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.

5. The Court erred in holding that the answer of the claimant fails to disclose a meritorious defense to said libel.

6. The Court erred in sustaining exception number 4 taken and filed to claimant's answer.

7. The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, that the said vessel "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, are liable to a penalty in the sum of four [43] thousand dollars, or any penalty, to be paid to the libelant, and that the libellant do have and recover from said libellee, the steamship "Nanking," her engines, etc., the said sum, or any sum.

8. The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, decreeing that the libellant, United States of America, do have and recover from said libellee, the steamship "Nanking," her engines, boilers, machinery, tackle, apparel and furniture the sum of four thousand dollars, in that said sum so decreed is excessive, and the amount thereof is not warranted by the facts as set forth in the pleadings.

9. The Court erred in rendering and entering the said decree for the enforcement of a penalty against the said vessel, in that the said court, sitting as a court of admiralty, was without jurisdiction to

hear or determine the question of whether or not there had been any violation of the provisions of said section 10, by the owner, master, officer or agent of the said vessel, and was further without the jurisdiction to impose any fine or penalty for any violation thereof.

10. The Court erred in rendering and entering the said decree for the enforcement of a penalty against the said vessel, in that the said court, sitting as a court of admiralty, was without jurisdiction to adjudge the said vessel liable for or subject to any specific fine or penalty under said section 10, or to enforce any lien therefor against said vessel, in the absence of a prior conviction of the person, owner, master, officer or agent of said vessel, upon a trial by jury, of a violation of the provisions of said section 10, and a prior imposition by a court having jurisdiction to try such offense of a specific penalty therefor in the form of a money fine (instead of imprisonment [44] or in addition to imprisonment) against the person so found guilty of such violation of said section 10.

11. The Court erred in rendering and entering the said decree for the enforcement of a penalty against the said vessel, in that the lien intended to be given by said section 10 may be enforced against a vessel only to the extent of such specific penalty, if any, in the form of a money fine, as shall previously have been lawfully imposed by a court having jurisdiction of the offense defined in said section 10 upon a prior conviction by a jury of the owner, master, officer or agent of such vessel of a violation

of the provisions of said section, for the payment of which specific penalty so imposed the said lien is intended as security.

12. The Court erred in its decision that said section 10 of said Act of February 5, 1917, is constitutional.

13. The Court erred in holding said section 10 to be constitutional, for the reason that in so far as the said section 10 purports to authorize the enforcement of any penalty or lien therefor in a proceeding *in rem* against a vessel without there having been a prior conviction, upon a trial by jury, of the owner, master, officer or agent of such vessel of having violated the provisions of said section and without a specific penalty therefor having been previously determined and imposed as a fine upon and against the convicted offender by a court having jurisdiction of said offense, the same operates or will operate to deprive the owner of such vessel of his property without due process of law and is unconstitutional and void.

14. The Court erred in holding said section 10 to be constitutional, because in so far as said section purports to authorize the imposition and enforcement of a penalty against the property of the owner of the vessel involved, without such owner, [45] or the master, officer or agent of said vessel having previously been convicted, upon a trial by jury, of having violated the provisions of such section, the same is unconstitutional and void; and, by the making and entering of said decree, the claimant herein as owner of said vessel has been subjected to a pen-

alty provided by said section for the misdemeanor therein defined without said owner or master, officer or agent of said vessel having been either charged with or convicted of said offense, and said owner has thereby been denied the right of a trial of the alleged offense by jury.

15. The Court erred in rendering and entering said decree, for the reason that said Court, sitting as a court of admiralty, had no power, authority or jurisdiction to hear or determine a claim for the recovery of any penalty alleged to be due or recoverable in a civil action under said section 10.

16. The Court erred in rendering and entering said decree, for the reason that in so far as said section 10 may be construed to authorize the initiation and maintenance of a suit or proceeding in a court of admiralty, *in rem* against the property of the owner of said vessel, without the intervention of a jury, to recover a sum or sums claimed to be recoverable as a penalty for the violation of said section 10, the same is unconstitutional and void as a deprivation of the right of trial by jury given by Article VII of the Constitution of the United States.

17. The Court erred in rendering and entering said decree, for the reason that it was and is beyond the power of the Congress of the United States to deprive the owner of said vessel of the right to a trial by jury given by Article VII of the Constitution of the United States by authorizing or attempting to authorize the recovery of a penalty in a court of admiralty [46] for the alleged violation of said section 10, in that any claim for the recovery of

such penalty is not a subject of admiralty jurisdiction.

18. The Court erred in rendering and entering said decree, for the reason that it is beyond the power of the Congress of the United States to make the penalty provided in said section 10 a maritime lien, for the reason that the liability created by said section 10 for a violation of its provisions is not maritime in its nature.

19. The Court erred in rendering and entering said decree without having required the libellant to prove the allegations set forth in paragraph 6 of each of the several counts of said libel, that in the opinion of the Secretary of Labor it was or is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of said vessel for the alleged violation of said section 10.

20. The Court erred in rendering and entering said decree without having required the libellant to prove, in each of the four cases set forth in the separate counts of said libel, that it was in fact impracticable and inconvenient to prosecute the person, owner, master, officer or agent of said vessel for the alleged violation of said section 10.

WHEREFORE, and in order that the foregoing assignment of errors may be and appear of record, the said libellee and claimant, appellants herein, file and present the same and pray that they be disposed of as provided by law.

Dated, Honolulu, Hawaii, January 30th, 1922.

W. O. SMITH,

L. J. WARREN,

W. L. STANLEY,

R. A. VITOUSEK,

Proctors for said Libellee and Claimant. [47]

Adm. No. 204. In the District Court of the United States for the Territory of Hawaii. In Admiralty—In Rem. The United States of America, Libellant, vs. The Steamship “Nanking,” Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Libellee, and China Mail Steamship Company Limited, Owner and Claimant. Praecepice for Transcript on Appeal. Filed January 30, 1922, at 3 o’clock and 55 minutes P. M. Wm. L. Rosa, Clerk. By (S.) Wm. F. Thompson, Deputy Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 205 Bank of Hawaii Bldg., Honolulu, T. H., Proctors for Libellee.

Received a copy of the within Praecepice for Transcript on Appeal this 30th day of January, 1922.

(Sgd.) S. C. HUBER,

United States District Attorney, Proctor for Libel-
ant. [48]

In the District Court of the United States for the
Territory of Hawaii.

IN ADMIRALTY—IN REM.

ADM. No. 204.

THE UNITED STATES OF AMERICA,
Libellant,
vs.

The Steamship “NANKING,” Her Engines,
Boilers, Machinery, Tackle, Apparel and
Furniture,

Libellee,

and

CHINA MAIL STEAMSHIP COMPANY, LIM-
ITED,

Owner and Claimant.

Praecipe for Transcript of Record on Appeal.

To the Clerk of the United States District Court
for the District and Territory of Hawaii:

You are hereby requested to prepare and certify
a transcript of the record in the above-entitled
cause, to be transmitted to and filed in the office of
the Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit, upon the appeal here-
tofore taken by the libellee and claimant in said
cause and the assignment of errors filed herein; the
said transcript to contain the following:

1. The style of the Court, above appearing.
2. The names of the parties, setting forth the

50 *China Mail Steamship Company, Limited,*

original parties, to wit: Of the libelant and libellee above named, and the name of the claimant herein, above named, who has become a party before the appeal, by virtue of its appearance as such claimant. [49]

3. The libel (including the order for process).
4. The answer of the claimant.
5. The libelant's exceptions to claimant's answer to the libel.
6. The Court's decision on the exceptions to said answer.
7. The final decree.
8. The notice of appeal by the libellee and claimant.
9. The assignment of errors.
10. This praecipe.
11. The subjoined stipulation relating to this praecipe.
12. Your certificate to said record on appeal.

Dated, Honolulu, T. H., January 30, 1922.

(Sgd.) W. O. SMITH,

(Sgd.) L. J. WARREN,

(Sgd.) W. L. STANLEY,

(Sgd.) R. A. VITOUSEK,

SMITH, WARREN, STANLEY & VITOUSEK.

Stipulation.

It is hereby stipulated and agreed between the parties to the above-entitled cause, by their undersigned proctors, respectively, that the transcript on appeal of the libellee and claimant in said cause may consist of the several matters particularly

enumerated in the foregoing praecipe, and that all other matters may be omitted.

(Sgd.) S. C. HUBER,
Proctor for Libellant.

(Sgd.) SMITH, WARREN, STANLEY &
VITOUSEK,
Proctors for Libellee and Claimant. [50]

In the District Court of the United States for the
Territory of Hawaii.

No. 204.

THE UNITED STATES OF AMERICA,
Libellant,

vs.

The Steamship "NANKING," Her Engines,
Boilers, Machinery, Tackle, Apparel, Furni-
ture,

Libellee,

and

CHINA MAIL STEAMSHIP COMPANY, LIM-
ITED,

Owner and Claimant.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
Territory of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the District Court of
the United States for the District and Territory of
Hawaii, do hereby certify the foregoing pages,

numbered from 1 to —, inclusive to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that the cost of the foregoing transcript of record is \$16.35, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 5th day of April, A. D. 1922.

[Seal] WM. L. ROSA,
Clerk United States District Court, Territory of
Hawaii. [51]

[Endorsed]: No. 3863. United States Circuit Court of Appeals for the Ninth Circuit. China Mail Steamship Company, Limited, a Corporation, Owner and Claimant of the Steamship "Nanking," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellant, vs. The United States of America, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed April 19, 1922.
F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHINA MAIL STEAMSHIP COMPANY, LIMITED, a Corporation, Owner and Claimant of the Steamship "NANKING", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

APPELLANT,

VS.

THE UNITED STATES OF AMERICA,

APPELLEE.

BRIEF FOR APPELLANT

*Upon Appeal from the United States District Court
for the Territory of Hawaii.*

SMITH, WARREN, STANLEY & VITOUSEK,

L. J. WARREN,

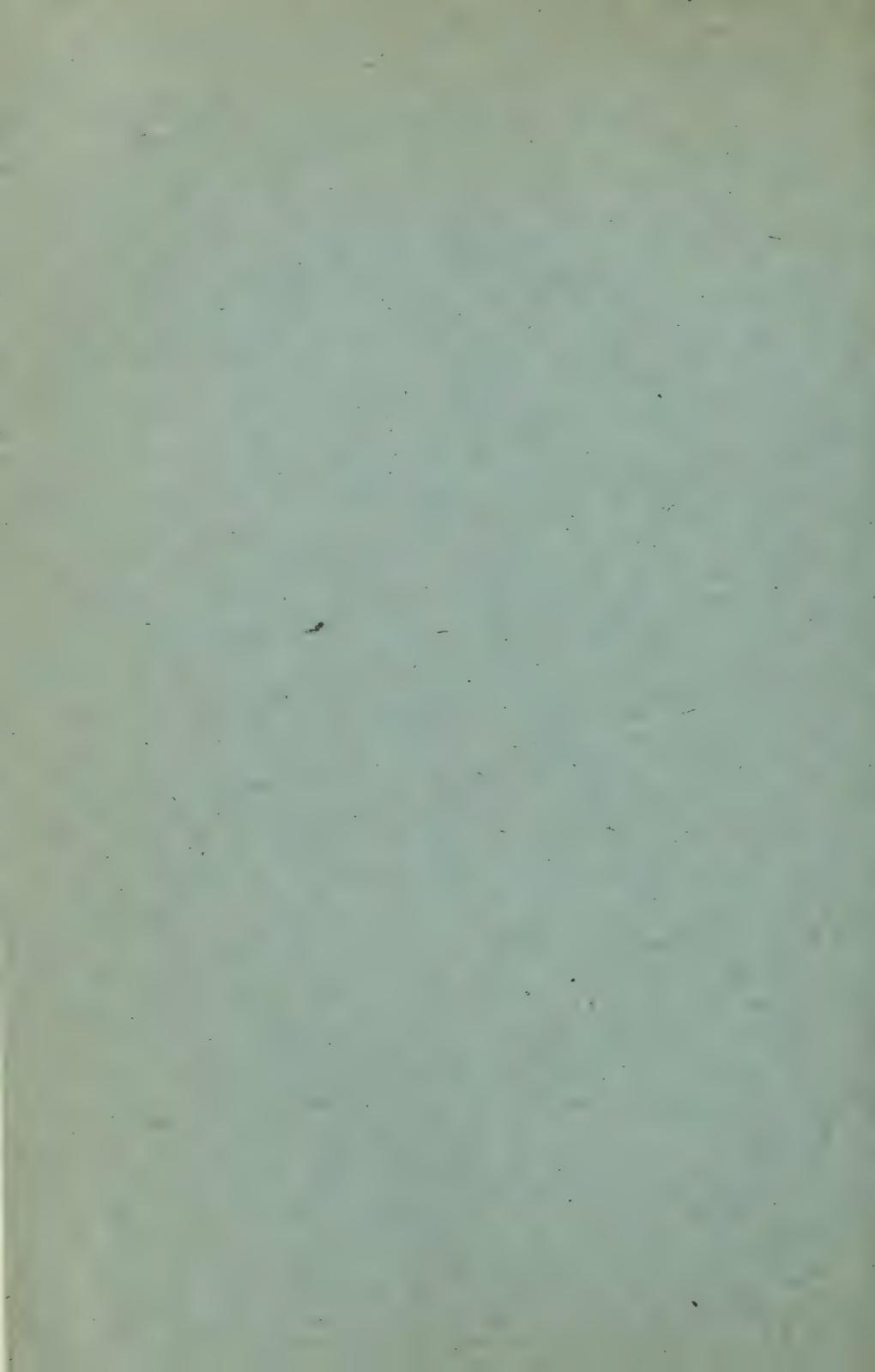
R. A. VITOUSEK.

Attorneys for Appellant.

Filed this _____ day of _____, 1923.

F. D. MONCKTON, Clerk.

By WILLIAM H. COOPER, Deputy Clerk.



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IN THE .

United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

CHINA MAIL STEAMSHIP COMPANY, LIMITED, a Corporation, Owner and Claimant of the Steamship "NANKING", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
APPELLANT,
VS.

THE UNITED STATES OF AMERICA,
APPELLEE.

BRIEF FOR APPELLANT

*Upon Appeal from the United States District Court
for the Territory of Hawaii.*

STATEMENT OF THE CASE

In this case the United States, by the District Attorney, filed its libel on July 2nd, 1921, in admiralty in the United States District Court for the Territory of Hawaii, to subject the steamship "Nanking", under four separate counts, to penalties aggregating \$4000.00 under the provisions of Section 10 of Chapter 29 of the Immigration Act of Feb. 5, 1917, (Sec. 4289-1/4 ee 1919 Supp. U. S. Comp. Statutes—39 Stat. 881) on account of the landing of four Chinese named as Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam, at Honolulu, on February 1st or 2nd, 1921, from

the said ship, which time and place had not been designated for the said landing by the immigration officers, and asked a decree for the amount of the penalty, that is \$1000.00 for each alien. The libel also alleged in each count that "in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the "unlawful landing" of the alien. (Record, p. 4.)

The China Mail Steamship Company, Limited, as owner and claimant of the vessel, filed its answer admitting that these aliens did land in the United States, at Honolulu, without having actually been prevented therefrom by the owners, officers, and agents of the said "Nanking", but denying that they unlawfully permitted such landing (Record, 21), and setting up, in defense, that these men escaped from the vessel notwithstanding the taking of every reasonable and proper precaution to prevent any alien passengers from landing and that no alien or Chinese did in fact leave the vessel except over the gangway and then only upon exhibiting proper passes issued by the United States Inspector of Immigration. The fraudulent use of passes is also alleged, as well as the issue of such passes or permits for more than one person whereby any number of persons less than the whole number of persons stated therein could go on board on the pass and the full number come off—a condition which rendered it impossible for the steamship company to prevent a possible illegal landing. (Record, pp. 22-24.) The answer also alleges that the said Section is unconstitutional in so far as it imposes a penalty in spite of every effort to prevent the inhibited landing. (Record, p. 24.) The answer required the libellant to prove the allegation of the libel that in the opinion of the Secre-

tary of Labor it was impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of the vessel. (Record, p. 21.)

The Libellant filed exceptions to the answer which, in effect, amount to the claim that inasmuch as the actual landing of these aliens was admitted, nothing else is material, and none of the matters set up in the answer constitute a defense. (Record, pp. 27-28.)

The case was tried as one in admiralty, and Court held Section 10 to be constitutional, and sustained the exception, holding that the answer did not contain a meritorious defense for the reason that under the act referred to the duty to prevent such aliens from landing at any place other than that designated by the immigration officials is made absolute, and that the various changes in the statute on the subject indicate that Congress intended to make such duty absolute. (Record, pp. 33-34.)

The Libellee elected not to amend its answer, and the court by decree assessed a penalty against the vessel in the sum of \$4000. (Record, p. 35.)

Section 10 of Chapter 29 of the Immigration Act of Feb. 5th, 1917, under which this suit was instituted, reads as follows:

"Sec. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of such person, owner, officer, or agent to comply with

the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

ERRORS RELIED UPON

The following errors have been assigned (Record, pp. 40-47), and are now relied upon as reasons why the decree in this case should be set aside.

1

The Court erred in its decision that by virtue of the provisions of Section 10 of the Act of Congress of the United States approved February 5, 1917, entitled "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was and is the absolute duty of every person, including owners, officers, and agents of vessels bringing any alien to any seaport of the United States to prevent under all circumstances the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and that the penalties of said section will apply if any such alien has in fact effected an escape from such vessel without the knowledge or consent of the owner, officers, master or agents thereof and notwithstanding such owner, officers, master and agents may have exercised due diligence and taken

every reasonable and proper precaution to prevent such unauthorized landing, and notwithstanding such escape may have been effected by means beyond the reasonable power of the said owners, officers, master and agents of the vessel to have anticipated and prevented.

The Court erred in its decision that, by virtue of said section 10, it was the absolute duty of the owner, officers and agents of the said steamship "Nanking" to have prevented the aliens named in the libel herein, to-wit, Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam, and each of them, from landing at the port of Honolulu, when it affirmatively appears by paragraph VII of the answer of the claimant herein that the said aliens in fact effected an escape from said vessel against the will and intent of the owner, officers and agents of said vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said aliens from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any alien passengers from leaving said vessel, and that none did in fact leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigration at Honolulu, and that no alien did in fact leave said vessel over said gangway without exhibiting such pass, and notwithstanding the claimant has by its answer to said libel alleged and offered to prove that the said escapes were effected by the fraudulent and

improper use of passes theretofore regularly issued by the United States Inspector of Immigration at Honolulu in the manner in said answer set forth.

The Court erred in sustaining exception Number 3 taken and filed to claimant's answer and holding that the matters and things alleged in paragraph VII of claimant's answer as above set forth do not state a defense to said libel.

(The matters alleged in paragraph VII of claimant's answer, herein referred to, are quoted as follows:

"That the said four alien passengers escaped from the said vessel against the will and intent of the owner, officers and agents of the vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said alien Chinese from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any passengers on said vessel from leaving said vessel, and none in fact did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigration at Honolulu, and that no alien or Chinese passengers did in fact leave said vessel over said gangway without exhibiting such pass; and claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and properly issued by the United States Inspector of Immigration at said Honolulu, and ap-

proved by Castle & Cooke, Limited (the then agents for said steamship company), to Chinese residents of Honolulu having lawful business on the vessels of said steamship company, which fraudulent use consisted in one or more of said passes (either with or without the connivance of the legitimate holders thereof therein named) having been given to one or more persons holding his or their own proper pass or passes, who took such other passes on board the vessel and there gave such other passes to the several Chinese who escaped, thereby enabling said escaping Chinese to use said passes as though their own, by falsely impersonating the person named in such pass, with the aid of wearing some article or articles of wearing apparel theretofore surreptitiously furnished to them by conning friends or agents and bearing some mark denoting the origin or purchase thereof in Honolulu, thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in a manner beyond the power of said steamship company to have anticipated and prevented; and also, as claimant is informed and believes, and proposes to prove in this cause, passes or permits were occasionally made out by the Inspector of Immigration at Honolulu for more than one person for Chinese of Honolulu desiring to visit on board vessels in port and it would therefore be possible and easily practicable for such passes to be used by one or more persons less than the whole number of persons mentioned therein in boarding any vessel and then used to pass from the ship by the full number of persons therein mentioned; and that on February 1, 1921, while said steamship "Nanking" was in port at Honolulu, Chinese visiting them from Honolulu did board said vessel, over the regular gang-

way with passes issued by said Immigration Inspector, and, while claimant cannot allege or prove with certainty that any such double passes were in fact then used, claimant nevertheless alleges that the existence of such a situation would render possible the illegal landing of alien passengers, notwithstanding all efforts of the steamship company to prevent the same.”)

4

The Court erred in its refusal to find and hold that in so far as the said section 10 purports to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.

5

The Court erred in holding that the answer of the claimant fails to disclose a meritorious defense to said libel.

6

The Court erred in sustaining exception number 4 taken and filed to claimant's answer.

(Exception 4, here referred to, is quoted as follows:

“4. That the allegations of Article VIII of said answer are wholly insufficient and state no facts upon which to base and sustain the claim that Section 10, Chapter 29, of the Act of February 5, 1917, is illegal

and unconstitutional, and that the allegations of said Article VIII state only the conclusion of the pleader."

Article VIII of claimant's answer, so referred to in libellant's exception 4, is quoted as follows:

"That in so far as section 10 of Chapter 29 of the Act of February 5, 1917, relating to Immigration assumes or may be construed to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the Immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof, the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.")

The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, that the said vessel "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, are liable to a penalty in the sum of four thousand dollars, or any penalty, to be paid to the libellant, and that the libellant do have and recover from said libellee, the steamship "Nanking", her engines, etc., the said sum, or any sum.

The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, decreeing that the libellant, United States of America, do have and recover from said libellee, the steamship "Nanking," her engines, boilers, machinery,

tackle, apparel and furniture the sum of four thousand dollars, in that said sum so decreed is excessive, and the amount thereof is not warranted by the facts as set forth in the pleadings.

The Court erred in rendering and entering said decree without having required the libellant to prove the allegations set forth in paragraph 6 of each of the several counts of said libel, that in the opinion of the Secretary of Labor it was or is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of said vessel for the alleged violation of said section 10.

The Court erred in rendering and entering said decree without having required the libellant to prove, in each of the four cases set forth in the separate counts of said libel, that it was in fact impracticable and inconvenient to prosecute the person, owner, master, officer or agent of said vessel for the alleged violation of said section 10.

ARGUMENT

There are several principal points or principles contended for by the appellant.

FIRST: Looking at Section 10 of the Immigration Act of February 5, 1917, from the Government's standpoint that it controls the case in hand, it is contended:

(1) That Section 10 should not be taken as imposing *an absolute duty*, in any event,—figuratively “though the heavens fall”—to prevent an alien from escaping from a vessel, and, on an escape, as imposing a penalty notwithstanding every effort made and all

due diligence exercised to prevent it, even in the face of conditions which were created by the Immigration officials themselves, and which were sufficient to defeat and render ineffectual the efforts so made by the vessel to carry out the law.

(2) That if Section 10 must be regarded as imposing such an absolute duty, despite earnest efforts to comply with its terms, and a penalty imposed if an alien then escapes and gets ashore, it is unconstitutional.

SECOND: The case of the libellant was not made out, inasmuch as any right to sue civilly under Section 10 was dependent upon a showing that it was for some reason impracticable and inconvenient for the Government to prosecute the person, owner, master, officer or agent of the vessel, or at least upon some evidence to support the allegation of the libel that "in the opinion" of the Secretary of Labor it was impracticable and inconvenient so to do,—this allegation not being among those admitted by the libellee and proof thereof being called for by its answer, and nothing having been offered to show that the Secretary of Labor ever entertained or expressed any opinion whatever.

THIRD: The fines imposed aggregating \$4000. were grossly excessive, in contravention of our Constitution.

FOURTH: That aside from all of the foregoing considerations, the decision cannot be supported for the entirely separate reason that the Immigration Act of February 5, 1917, of which Section 10 is a part, does not apply to this case, because the offense comes under the Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. L. 58, and its amendments), for which reason the court had no jurisdiction to entertain a suit under section 10 in this case.

Discussing the foregoing points seriatim:

FIRST: As to the issue of "absolute duty" to prevent a landing:

It is recognized that Section 10 of the Act of February 5, 1917, has taken the place of Sec. 18 of the Act of February 20, 1907, in which, on the same subject, the word "failure" was preceded by the word "neglect", so that it provided:

"It shall be the duty of the owners, officer, or agents of any vessel * * * to prevent the landing of such alien * * * at any time or place other than as designated by the immigration officers, and the *negligent failure* of any such owner, officer or agent to comply with the foregoing requirements shall be deemed a misdemeanor."

But, before discussing the law, we wish to indicate the facts, as set up in claimant's answer and which, on the issue presented by the exceptions to the answer, the court will assume to be true.

The matters set up in the present case, as a defense on the merits, have already been set out on pages 8 to 10 of this brief under the statement of error No. 3, and twice in the printed record, i.e.—on pages 22-24 in claimant's answer, and again as quoted at length in the judge's decision on pages 30-32. This defense, which claimant has offered to prove, was, in effect:

- (a) That these four men *escaped* against the will and intent of the owner, master, etc., of the vessel;
- (b) That their landing at Honolulu was not knowingly or negligently permitted;
- (c) That every reasonable and proper precaution was taken whereby no passengers in fact left or escaped from the vessel unless by passing over the regular gangway to the dock, which was well guarded by the vessel to prevent all aliens leaving the vessel *except* on "proper passes issued by the Inspector of Immigration

at Honolulu" and that "no alien or Chinese passenger did *in fact* leave said vessel over said gangway without exhibiting such pass";

(d) That a pass system existed in Honolulu under which it was possible for Immigration Office passes, regularly issued to Chinese residents, to be fraudulently used, by being sent on board by another pass holder and then used, coupled with false impersonation and disguise, to pass their apparently proper holders out of the vessel "*thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in a manner beyond the power of said Steamship Company to have anticipated and prevented*";

(e) That the Inspector of Immigration occasionally issued passes for more than one Chinese person—(may we say here, "Ching Lee and party of three" for example), so that one or two could go on board, and two or three or four come off,—this being a *condition asserted and proposed to be proved in defense*, though proof that these escapes were actually accomplished by the use of such double passes may not be obtainable.

And here we wish to make it clear that the answer leaves no room for any query of why, if the pass system were subject to such abuses, could it not have been avoided by care in that regard? It cannot be inferred that the abuses were known at the time. Had they been known it is conceded they might have been looked for and perhaps prevented. We say perhaps, even here, for it would be hard to hold the steamship responsible for a condition created and maintained by the Immigration office. But the answer unqualifiedly states that the fraudulent use of passes was done "in a manner beyond the power of said steamship company to have anticipated and prevented" (Record, p. 23), which

sufficiently negatives any idea of knowledge at the time that such a scheme was being worked. Were any new cases of the kind to occur, there would be room for question, on the fact of knowledge of such possible escapes by that method, whether any further escapes might not be anticipated and prevented.

We have not only an affirmative showing of an escape in spite of all vigilance of the vessel's people to prevent it, but a showing also of a condition created by the Government itself in the matter of passes which opened and maintained an avenue which the vessel's people could not well have closed, and which having been open, in all probability was used by the Chinese who escaped.

The argument of absolute liability would make this all immaterial; it would mean that *if* an alien escapes, no matter how or under what conditions, though the own fault of the immigration officers, the owner, master, agent, (etc.) of the vessel are all criminally liable and subject to imprisonment, and the vessel civilly liable to seizure and sale; and though a master might himself be beaten into insensibility while trying to prevent an escape, he would remain liable to punishment even by imprisonment,—for the law says so. It is no answer to say that such a punishment in such a case would never be inflicted. It *could* be, if the absolute duty exists. If, by judicial clemency, only the least possible fine were imposed, would the principle be different? Either would be punishment,—right or wrong *in principle*. And then, on like facts as to efforts to keep the law, without success, the same theory of absolute duty would, on a mere “opinion”, so change the case as to require the *heaviest* fine against the vessel.

Except for the “Coamo” case, hereinafter mentioned, we have been unable to find any decision directly under

the present Section 10. The case of *Hackfeld v. United States*, 197 U. S. 442, 49 L. Ed. 826, involved a construction of the word "neglect" as used in Section 10 of the Act of March 3, 1891 (26 Stat. at L. 1084, ch. 551), where the provision was that if any master, agent, etc., "shall refuse to receive back on board the vessel such aliens" (destined for deportation) "or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came" (etc.). The lower court had found the vessel owner guilty of having "refused and neglected" to return two Japanese immigrants, ordered deported, but who escaped. There, the government contended that the statute imposed "the absolute duty" of returning the immigrants, and that the word "neglect" was equivalent to "fail" or "omit", and the return was required at all hazards. The court regarded the word "neglect", as used, as capable on the one hand of meaning a failure or omission through carelessness or disregard,—"a want of such attention to the nature and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns,"—and also as equivalent to "fail" or "omit,"—depending upon the connection in which it is used. Treating it as a highly penal statute the former meaning was adopted as applicable, on the assumption that if it were intended to make the owner or master "an insurer of the absolute return of the immigrant, at all hazards, except when excused by *vis major*, or inevitable accident", Congress "would have affixed the penalty in cases wherein the owner or master *omitted* or *failed* to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel but had *permitted* the escape, either with or without fault on his part."

We realize that this tends toward the view that the amendment of Section 10, by dropping out of the word "negligent" from the couplet "negligent failure", leaving "failure" alone referring back to the duty "to prevent", Congress did thereby intend to make the duty absolute. But nowhere has it been decided that such an *absolute* duty would exist *at all hazards* or that such a statute would be valid to apply the penalty in the face of circumstances which we submit place the present case on a par with the exception indicated in the Hackfeld case where the words "at all hazards" would have to be qualified by the words "except when excused by *vis major*, or inevitable accident." And if the conditions in this case were such, caused by the immigration officials themselves, that, on the facts of the answer, they afforded the only channel for the escape of the men from the vessel, then the escape was, equally as *vis major*, beyond the vessel's power to have prevented. We submit that the *facts cannot* be disregarded in such a case as this.

Take the same law as contained in Sec. 18 of the Act of March 3, 1903 (32 Stat. L. ch. 1012), where, although it first prescribed a duty "to adopt due precautions to prevent" the landing of an alien, the further provision was, "and any such owner . . . who shall land or permit to land any alien at any time or place other than that designated by the immigration officer, shall be deemed guilty" (etc.). In the case of *Frank Waterhouse & Co. v. United States*, 159 Fed. 876, the defendants were charged with a violation of the separate section as to "refusal or neglect" to return an alien to be deported, but the court quoted Section 18 as bearing on the point of whether the "refusal or neglect" to return a man ordered deported would be

proved if a landing contrary to Section 18 were shown, and held that, as to Section 18, "the evidence did not tend in any degree to show that the master or any other officer of the vessel . . . *permitted* or in any way connived at Schmitz's desertion." There an alien seaman had deserted. The words "*who shall land* or permit to land" are in meaning the same as "fail to prevent."

If the duty to prevent landing were absolute, to what would it lead?

We find it said, in *Hackfeld v. United States*, 197 U. S. 442, 49 L. ed. 826, 831, that if the duty were absolute, at all hazards, the steamship companies "would doubtless claim the right to use all the force necessary to avoid the penalty"; and it would be difficult to see how it could be done "without such confinement or imprisonment as may result in great hardship to that class of individuals who may themselves have no intention to violate any law of this country." We add that it is inconceivable that Congress could pass a law which would practically compel vessel owners to imprison *or even chain up all aliens* on the vessels, on arrival at every American port, until permitted by the immigration authorities to land, regardless of class, sex, age or any other conditions, *on penalty* of being held to criminal liability for failure *if but one* escapes. The vessel would be subject, we think, to staggering liability to those so treated without justification of probable cause,—which *couldn't* be shown in ninety-nine cases out of a hundred. Let it be so held, and we need little more, added to the myriad of burdens and liabilities of vessel owners under the American flag, to drive our ships out of business. It would be too perilous to subject the enterprise to the Scylla on the one hand of fines and penalties (and possible imprisonment) when aliens escape in spite of all just precautions, and the

Charybdis on the other of possible bankruptcy from damage suits by passengers whose legal rights would be infringed by such gross abuse of their liberty.

The United States Government is progressing toward a heavy repression of foreign commerce by the growing practice of penalizing vessels and owners and masters for things they themselves strive unceasingly and honestly to prevent in the way of unauthorized landing of aliens and proscribed commodities. A sane constitutional interpretation and administration of law will help the situation. As it is, this case now before the Court shows how co-operation by vessel owners in all good effort to keep the law can be penalized, and we submit that it *would* be penalized in this case if this decision stands.

It is submitted that the errors assigned as Nos. 1 to 7, both inclusive, are well founded, and the decision should be set aside.

SECOND: The fines were not legally imposed, because the essential condition precedent to the filing of any suit *in rem* was not shown. The provision for a lien on the vessel for a penalty of \$1000. is new, and it is alternate to the criminal side of the section. This statute says that on its one side is an offense, criminal in its nature, punishable by fine or imprisonment, for which the fine may be as severe as \$1000. or as low as \$200. Will it be held that it vests in the Secretary of Labor the power, by a mere mental conception of his own as to what constitutes convenience or practicability, to cut off all degrees of punishment and require the maximum fine against the vessel,—*whatever* extenuating circumstances there may have been which, in the criminal proceeding might in common justice cry aloud, with success, for the minimum fine?

The libel alleges, in paragraph 6 of each count,

"That in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent" (etc.). The answer calls upon the libellant to prove that allegation (Record, p. 21). It was *not* proved in this case. Unquestionably the statute makes the civil remedy of a \$1000. fine as a lien on the vessel entirely dependent upon the *alternate* stated. Otherwise the civil remedy would be unauthorized. Is that alternate dependent upon *facts* as to impracticability or upon an *opinion* on that subject? Practicability means practicability on the facts. It would imply, at least, that the Secretary would consider and determine the matter in a practical and not a merely arbitrary way,—precisely as discretion lodged in a court means judicial discretion,—and while the matter *ought* to depend upon such things as whether or not the vessel was a "tramp" or made regular recurring calls at a local port convenient for access, etc., and whether or not the owner resided conveniently near, or there were an agent in reach, or something that would give at least a little color for or against a reasonable supposition that the vessel itself might be the only means of security for a fine and should be held safely from escape, we may assume that the decision of the Secretary on the question would not be open to question.

The word "opinion" as here used, should not be interpreted in a light or arbitrary sense, nor should the "opinion" be arrived at in a whimsical manner, nor just because the government might assume the ship would have no defense and the person would. The Secretary should have the facts before him and arrive at his opinion in a judicial manner. Among other definitions, Webster's New International states that "opinion" is "settled judgment in regard to any point, * * * a notion or conviction founded on probable evidence."

In the instant case it is to be noted that the government in its said allegation does not follow the statute but alleges that it is impracticable and inconvenient to "criminally" prosecute. Does it mean that it is impracticable or inconvenient to prosecute the person, or that it is impracticable or inconvenient *to secure a conviction?* Every trial of every kind is probably an inconvenience in some manner but certainly it is not with any such thought that Congress used the word.

But, if we regard the statute as making the alternate proceeding against the vessel depend, not on the *fact* of impracticability or inconvenience, but on the mere *opinion* of the Secretary,—whatever the facts or the reasonableness thereof,—then, doubtless, his opinion alone would be sufficient to establish the Government's right to proceed on the civil side of this statute.

But are we to suppose that even that opinion does not have to be shown as having been entertained and manifested in some way capable of proof? Is the civil action, so conditioned, to lie, and judgment be had, on an *unproved* opinion?

In the case of *Waterhouse Co. v. United States*, 159 Fed. 876, 879, the complaint included an allegation "that the Secretary of Commerce and Labor had ordered, directed and decided" that an alien was not entitled to land and should be deported. No evidence was offered to sustain this allegation except a statement by a witness that "after the arrest of this alien on the warrant of the Secretary of Commerce and Labor, * * * a written notice was served upon the ship's officers, and * * * upon Frank Waterhouse & Co." (the vessel's agent). The court, regarding the notice as apparently a demand on the vessel to take back the immigrant, held "we cannot, upon this evidence, deter-

mine what action the Secretary of Commerce and Labor took in this case."

It is submitted that the errors assigned as Nos. 19 and 20 should therefore be held well founded,—certainly error No. 19.

THIRD: The fine of \$1000. in each case was grossly excessive and in contravention of Article VIII of the Constitution.

Here is a statute which on its criminal side allows a minimum fine of \$200. and fixes a maximum of \$1000. The whole reason for minimum and maximum punishments rests upon the legal theory that, considering the object to be accomplished and the fact that latitude should be allowed by which the court, in the exercise of a sound discretion and judgment, may temper the punishment to fit the particular case,—applying the maximum where the conceivably worst features of an offense are involved,—wilfulness, repeated offenses, aggravating circumstances, vicious or wicked intent, etc., on the one hand, and extenuating circumstances, etc., on the other hand.

There is no reason why the fine should be in a variable amount and the penalty in a fixed amount. The civil penalty cannot be assessed unless the first part of the section is violated, and if any reason should exist why the fine for the crime should be less than \$1000. the same reason would exist for the civil penalty to be less than \$1000.

Treated on the criminal side of this statute, it would be rank injustice, to the normal mind, to impose a \$1000. fine in each case *on the facts* set up in the answer. A \$200. fine would meet every demand of justice. No element is present requiring a reformative effect of punishment,—the very non-necessity of it being outstanding.

And on an "opinion" of the Secretary, sound or unsound, and which does not assume a consideration by him of the merits of the case itself, the whole range for gauging the fine to fit the circumstances of the case is swept away by the single specification of a \$1000. fine against the vessel,—i.e., against its owner. Under the circumstances of this case a fine of \$1000. on the criminal side of this statute would shock the sense of fairness in the ordinary man, and it loses nothing in this regard by being imposed on the civil side. In *McMahon v. State*, 97 N. W. 1035, 70 Neb. 722, it was held that a penalty so excessive as to shock the sense of mankind is unconstitutional on that ground.

It is further submitted that under the circumstances of this case the imposition of a total fine of \$4000. was, by the fact of cumulation of the single fines, more distinctly violative of the inhibition against excessive fines. This case is different in principle from one where every day of continuance of an unlawful condition or failure of duty may fairly be treated as a separate offense, and different from a case where there were a series of separate acts each violative of law.

Here all of these four men escaped,—whether in a body at one time or separately at different times cannot be presumed, either way. Did the vessel's people "fail" in vigilance once, or four separate times?

Although we find that Section 10, before us, uses language on its criminal side to provide a penalty "in each case", we submit that this is not carried out on its civil remedy side, where the remedy and the penalty of \$1000. on the vessel is a different one from that prescribed on the criminal side, and while we may conceive that one violative *act* might result in the simultaneous landing of more than one alien, we find, on the civil side, only a provision for a penalty and lien on

the vessel "whose owner, master, officer or agent *violates* the provisions of this section,"—a single penalty capable of being taken as applying to a one or more landings through one violative act. In other words, the vessel is responsible for one penalty of \$1000. as an alternate to any number of prosecutions of the persons who individually or collectively were responsible for one common failure or shared in the failure; and we submit that where the failure was, as far as known, as well due to one act of failure (and if more than one the prosecution would have to prove it), there is no manifest intent that the word "violates", on the civil side of the section, has reference to anything more than a general failure on the criminal side. If more than one violative *act* or violative *condition* were shown, or a condition showing existence of an understanding by the "offender" that he was "landing" *four* men and yet *went ahead* with it, there might be four cases, although simultaneous, as in the case of *Grant Bros. Construction Co. v. United States*, 232 U. S. 647, 58 L. Ed. 776, where there was an affirmative bringing in of several aliens simultaneously. Our case is rather like that of *United States v. N. Y. Central & H. R. Co.*, 232 Fed. 179, where but one penalty was attached because there was but one single act of solicitation (under the contract labor law) of alien immigration although several aliens responded on the strength of the one offer of employment,—although the statute said that "for every violation of the provisions of section four of this act, the persons, partnership, company or corporation *violating* the same by knowingly assisting, encouraging or soliciting the immigration or importation of *any* contract laborer into the United States shall forfeit and pay for each such offense the sum of one thousand dollars", and where the statute further expressly provided

that "separate suits may be brought for *each alien* thus promised labor or service of any kind". This case was affirmed in 239 Fed. 130.

And again, in the case of *United States v. International Silver Co.*, 255 Fed. 694, it was similarly held that but *one* penalty could be recovered where there was a single act of violation, following the case in 232 Fed. 179, *supra*.

To illustrate, suppose four aliens were being guarded by the vessel's officers and for this purpose detained in a room on the dock under lock and key, and that some member of the crew, say after serving meals to the men, should inadvertently fail to lock the door and left, supposing the latch had caught, while in fact it had not, and the men on discovering this had made their escape in a body. Would there be one "failure" to prevent their landing or four failures; and would there be one "violation" or four violations; every one of which would rest upon the single act of failure to see that the door latch was properly caught?

In the case of *Missouri K. N. & T. R. Co. v. United States*, 231 U. S. 112, 58 Law Ed. 144, the Court upheld the provision of separate fines for separate offenses in a case where a railroad had kept a whole train crew working more than sixteen consecutive hours contrary to the Service Act of March 4, 1907. The defense set up by the railroad was that the delay of the train was a single act although it had several consequences and that there was but one violation of the law for which but one penalty should be imposed. The Court held, however, that the delay may have made keeping the men over time more likely but was not wrong in itself that after the delay the railroad kept the men working over time and that this was an offense as to each man. and did not in itself constitute the offenses and in effect

In the case we are supposing the inadvertent failure to lock the door of the room would *itself* constitute the failure and hence the violation, nothing else contributing thereto.

In the case at bar we are left in uncertainty,—and the Court will not speculate,—as to how or when these four men got ashore, and whether by one failure or violation or for four failures or violations.

It has several times been held that the imposition of separate penalties, all growing out of one act or an act so comprehensive in its nature as to be inseparably connected is constitutionally excessive. For example, in the case of *Central of Georgia Railway Co. v. Railroad Commission of Alabama*, 161 Fed. 925, 962-3, the railroad company was charged with a large number of separate violations of the law prohibiting more than a stipulated rate for the carriage of merchandise, the penalty being provided for "each offense", and the Court observed that by the act the transportation of *every* passenger and *every* piece of freight was made a separate offense, in view of which the carrier would necessarily commit several thousand violations of the statute in a day's business for each of which it would be subject to a fine not exceeding \$2000. and every employee knowingly engaged therein subject to a fine of not less than \$100. nor more than \$500. for each offense. The Railroad Commissioners fixed a penalty of \$50. in view of which the Railroad could be fined over one million dollars a day. It was held that such an imposition of fines would "shock the conscience of an ordinary man" and the Court took occasion (see p. 979) to refer to a number of cases which united in declaring that if the amount of a fine will shock the conscience it is "excessive" in a Constitutional sense.

See the case of *Central of Georgia Ry. Co. v. Rail-*

road Commissioners of Alabama, 161 Fed. 925, at pages 978-979, as to when and why excessive fines are unconstitutional.

In *United States v. Oregon Short Line R. Co.*, 218 Fed. 868, where different shipments of cattle were received at different hours but all were together unloaded into an improper pen (for rest in transit), there was but one offense on account of the whole unloading into such a pen of all the shipments.

In the case of *Standard Oil Co. v. United States*, 164 Fed. 376, 385, it was held that there was but one act of transportation, contrary to law, although several carloads were carried and under separate way bills, and but one offense, assuming it had been made out.

In the case of *Baltimore & Ohio S. W. R. R. Co. v. United States*, 220 U. S. 94, 55 Law Ed. 384, the railroad was charged with violating the provisions of the act placing a twenty-eight hours limit on the time of confinement of live stock in transit without unloading. Eleven separate actions was brought by the United States against the Railroad to recover the penalty provided by the act because there were eleven shipments all on one train. The Court held that but one penalty could be recovered, notwithstanding the statute prescribed a penalty "for every such failure." Although shipments were made at different times, the Court held that there was but one failure to unload them all within the stipulated limit of time and that but one penalty could be imposed,—saying: "The simultaneous failure to unload these four cars was single, and punishable as a single offense. But the duty and offense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of one."

This livestock case, of failing to unload all livestock

on the one train although under separate shipments, is different from such a case as *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92 where the penalty was for charging more than a certain rate on livestock and was upheld as to each separate *shipment* (but the idea repudiated as applying to each animal) where a separate overcharge had been specifically made as to each shipment.

Our case is also different from:

United States v. Carpenter, 151 Fed. 214, where four separate forgeries were committed to accomplish successive steps in one theft;

State v. Cotner, 127 Pac. 1, 42 L. R. A. N. S. 768, where the statute prescribed a separate penalty for each specific act of practicing medicine without a license;

Journal Pub. Co. v. Drake, 199 Fed. 572, where the penalty was specifically for \$1. for every sheet of copyrighted matter wrongfully held.

Separate impositions of the legal limit of a fine in a case of sixteen separate illicit sales of liquor would doubtless be warranted, but where a series of "separate" offenses all result from one single or continuing act or failure, it may be quite otherwise.

Whenever there is room for any question whether one penalty or several penalties may be imposed, the statute, being penal, will be construed as against more than one. See *People v. Spencer*, 201 N. Y. 105, Amer. Annot. Cases, 1912A, pages 818-820, and note collecting cases pro and con on pages 820-822. Also note on pages 228-229 of Amer. Annot. Cases 1916A.

In the case of *In re Maury*, 205 Fed. 626, 632, it is clearly intimated that a fine "out of proportion to the offense" would be excessive under the Constitution.

It should be conceived that maximum fines should be meted out to the worst offenders. In a case of an offense which rests upon a lack of vigilance, the imposition of a maximum fine where great vigilance *was* shown and the defendant was active in trying to fulfil the law, would take away all further incentive. The maximum imposition would moreover tend to defeat the very object of the law,—because excessive. If excessive in that degree, is it valid?

In the case of the *United States v. Steamship "Coamo"* in the United States District Court in and for the Southern District of New York, decided September 21, 1921, not yet reported, but of which a copy has been obtained, it was said by Judge Mack in an opinion given from the bench:

"The Statute does not say that the Court shall impose a penalty, it says the penalty shall be a lien. In other words the point is not the amount, but it is the lien. The penalty shall be a lien and it is only if it is impracticable or inconvenient to prosecute. * * * Now in order to hold the vessel—and the report shows that that is the purpose of it—the lien is given on the ship. The lien for what? The lien for the penalty of a thousand dollars? In view of this being a part of the proceeding section, what does this mean? The imprisonment cannot be a lien. It is the money that is going to be the lien. Well, what money? A penalty. Construed absolutely literally a penalty of a thousand dollars would require a thousand dollars; but doesn't it mean a penalty up to a thousand dollars, giving the Court discretion as to the amount of the penalty? I think it does, and I will so hold, and I will levy a fine of \$200. in each case."

We submit that the reasoning of this opinion should be followed in the case now before the court.

The assignment of errors Nos. 7 and 8 should be sustained.

FOURTH: The court had no jurisdiction to entertain this case as an alleged violation of Section 10 of the Immigration Act of February 5, 1917.

The Section 10 under which the Government proceeded in this case was passed by Congress as part of the Immigration Act of February 5, 1917. (Statutes at Large, Chap. 29, 212.) Sec. 38 thereof provides:

"That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section nineteen hereof . . ."

Section 19, referred to, relates to the deportation of aliens, and is not brought into this case in any way.

In the complaint and answer before the Court it is clearly brought out that the so-called aliens for whose landing the government seeks to recover a penalty are citizens of the Republic of China, and were Chinese persons. (Record, Pages 6, 9, 12, 15, 22, 23 and 24.) And it is also clearly shown that the "landing" of these Chinese persons was completed. (Record, Pages 7, 10, 13, 16, and 21.)

Section 4301 of the Compiled Statutes, 1916, which section is made a part of the Chinese Exclusion Act, provides, among other things, that:

"The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power;"

By virtue of Sections 4335 and 4337 of the Compiled Statutes, 1916, the provisions of the Chinese Exclusion Act are expressly made applicable to the Territory of Hawaii; and there is no question but that the restrictions placed upon the admission of Chinese to the

United States apply to this Territory. (22 Op. Atty. Gen. 249.)

The Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. L. 58) and its amendments, prohibits absolutely the immigration of Chinese laborers (Sec. 4290, Comp. St. 1916). Several classes of Chinese are, however, permitted to enter the United States by virtue of law and of the treaty of the United States with China.

But the Chinese Exclusion Act by its terms expressly prohibits *any* Chinese from entering the United States without a certificate from and permission of its government (Sec. 4293, Comp. St. 1916). This section embraces the following language:

“Such certificate vised as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and *shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States;* but said certificate may be controverted and the facts therein stated disproved by the United States authorities.”

Section 4295 of said Compiled Statutes, 1916, provides that the master of any vessel before landing or permitting to land any Chinese passengers shall deliver and report a complete list of all such passengers on board to the collector of customs.

Section 4296 of said Compiled Statutes, 1916, provides as follows:

“Before any Chinese passengers are landed from any such vessel, the collector, or his deputy shall proceed to examine such *passengers*, comparing

the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law."

Section 4310 of the Compiled Statutes, 1916, provides:

"The master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer *or other Chinese person*, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than five hundred dollars nor more than one thousand dollars, in the discretion of the court, for every Chinese laborer *or other Chinese person* so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court."

And Section 4297 of the Compiled Statutes, 1916, provides:

"Every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

So we find that in the present case if there had been any violation of the law in the landing of said Chinese persons it was a violation, not of Sec. 10 of the Act of February 5, 1917, but of the provisions of the Chinese Exclusion Act, and a violation for which the Chinese Exclusion Act provides specific penalties, both as to the master, etc., and against the vessel. And in this case the government is endeavoring to proceed under the general immigration laws when the act complained

of was a violation of a specific law applying to Chinese.

The courts have repeatedly held that it is a cardinal rule of the construction of statutes that specific legislation in regard to a particular class or subject is not affected by general legislation in regard to many classes or subjects, of which that covered by the specific legislation is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed to have intended thereby to modify or repeal it; the special and general legislation must stand together, the former as the law of a particular class or subject and the latter as the general law upon other subjects or classes within its terms.

Washington v. Miller (235 U. S. 422) 59 Law Ed. 295, 299.

Harris v. Bell (C. C. A. 8th Circuit) 250 Fed. 209, 216.

Anchor Oil Co. v. Gray, et al., 257 Fed. 277, 283.

Frost v. Werrie (157 U. S. 46) 39 Law. Ed. 614.

U. S. v. Healy (160 U. S. 136, 137) 40 Law Ed. 369.

Townsend v. Little (109 U. S. 504, 512) 27 Law Ed. 1012.

Petrie v. Creekman Lumber Co. (199 U. S. 487, 496) 50 Law Ed. 281.

A question identical with that now presented was before the courts in the case of *Stoneberg v. Morgan*, 246 Fed. 98 (C. C. A. 8th Circuit). In the Stoneberg case the defendant was charged under the Immigration Act with unlawfully bringing in a Chinese person, an offense denounced by the Chinese Exclusion Act. The penalty under the Immigration Act was a possible fine

of \$1000. and imprisonment for two years, and the penalty under the Chinese Exclusion Act was a possible fine of \$1000. and imprisonment for one year. The Appellate Court held that the lower court had no jurisdiction to sentence the defendants under the Immigration Act. In so deciding the court followed the rule of law above set forth. It was held that where two pieces of legislation, one general and one special, made the same act a crime, the special legislation must be held to apply in the premises to the exclusion of the general legislation, and in support of the rule cited a large list of authorities.

The Supreme Court has taken up at various times cases involving Chinese, and the question of how far the general immigration laws apply to them, but it has never had before it a case on all fours with or similar to this one. In the recent case of *United States v. James Butt* (257 U. S. 38) 65 Law Ed. 119 (no brief being filed by defendant), it was held that a person attempting to bring in Chinese who *did not proceed far enough to violate* the terms of the Chinese Exclusion Act could be prosecuted under the terms of the Immigration Act. This holding is not adverse to our contention. In the case we are submitting there is a clear showing in the allegations of the libel that the Chinese were *landed*, and if landed it was unlawful under the provisions of the Exclusion Act (as well as under the provisions of the Immigration Act). The act complained of, if unlawful, was made so by the Exclusion Act.

It may easily be seen from the parts of the Exclusion Act that we have quoted that it contemplates and provides for the same procedure as the Immigration Act. All Chinese must present a certificate entitling them to enter the United States. Without such a certificate they are for the purposes of the Act automati-

cally classed as laborers and consequently as such are not permitted to land. The Chinese passengers on the ship are examined by the immigration officials, and those of the exempt class (which fact is evidenced solely by the certificate), are of course permitted to land. Inasmuch as the four Chinese that landed from the "Nanking" had no authority to land and were therefore unlawfully landed, they were, under the provisions of and for the purpose of the Exclusion Act, laborers, and if they landed their landing was a violation of that Act. This was clearly the intention of Congress, as no evidence other than the certificate was permissible to permit the Chinese to land. Thus we find a condition of affairs completely covered by the Exclusion Act, and under the rule of construction above set forth the court did not have jurisdiction to penalize the "Nanking" under the provisions of the general Immigration Act.

In view of these considerations it is submitted that the court had no jurisdiction to entertain this action under the Immigration Act, and the decision is void for that reason. Therefore the error assigned as No. 7 should be held well founded.

In conclusion: If the Chinese Exclusion Act is not controlling, and if the alternate fact constituting the condition for the civil suit does not have to be proved, then what strongly impresses us is that if any penalty at all is to be upheld in this case, on the facts offered by the claimant in defense, it will be against an "offender" innocent of intent to do a wrong, without knowledge of the "landing" of the men, guilty of no wrong, whose every effort (through its officers, agents, etc., of the vessel) was to uphold this very law by active measures,—but *penalized* notwithstanding. It is not within the ken of the ordinary mind to be pun-

ished for trying to do the right thing,—just as though he had wilfully done the wrong thing. Were this a criminal prosecution under this identical law, say against the master, on the same set of facts, he could actually be sent to prison for no reason except that he failed in his best efforts to keep the law. The supposition as to imprisonment is as good in law as the penalty on the civil side. *Can this be done,—under our Constitution?*

Section 10 of the Immigration Act may well have been constitutional as it stood before the word “negligent” was dropped out of it, *but*, we earnestly submit, *it isn’t now.*

For the reasons presented, it is our belief that the decree appealed from should be set aside.

Respectfully submitted,

SMITH, WARREN, STANLEY & VITOUSEK,

L. J. WARREN,

R. A. VITOUSEK.

No. 3863

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHINA MAIL STEAMSHIP COMPANY,
LIMITED, a corporation, owner and
claimant of the Steamship "Nanking,"
her engines, boilers, machinery, tackle,
apparel and furniture,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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WM. T. CARDEN,
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THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

STATEMENT OF THE CASE.

This is an appeal from the decree of the District Court of Hawaii rendered in an admiralty proceeding. The United States presented a libel in rem in four counts, identical in form, each to enforce the lien of the government for a penalty of \$1000.00 upon the claims that the owners, officers and agents

of the steamer did not prevent a certain alien passenger from landing at Honolulu in a place not designated by any Immigration Officer. It was prosecuted under the provisions of Section 10 of the Act of February 5, 1917, (39 Stat. 881; Section 3708 Barnes Federal Code, 1919,) which Section is set forth in extenso in the first paragraph of each count of the libel.

It is alleged in each count of the libel that during the months of January and February, 1921, the "Nanking" was a common carrier of passengers, operating by steam power between the ports of Hong Kong, China, and San Francisco, California; that on February 1, 1921, there was being carried and transported from Hong Kong, China, to Mazatlan, Mexico, through San Francisco, as a passenger, on said "Nanking" a named person who was an alien and a subject of the Republic of China; (Record page 6). These averments were expressly admitted in paragraph one of the answer of the China Mail Steamship Company, Limited, owner and claimant of the steamship. (Record p. 21).

It was further alleged in paragraph three in part:

"That from about 4:10 o'clock p. m. of the 1st day of February, 1921, to about 2 o'clock a. m. of the 2nd day of February, 1921, the said steamship "Nanking" was docked at the port of Honolulu, District of Hawaii, and the said * * * was then and there a passenger on the said "Nanking" having theretofore taken pass-

age on said "Nanking" at the port of Hong-kong, in the Republic of China;" (Record p. 6).

these allegations were expressly admitted in paragraph two of the answer. (Record p. 20).

It was alleged in paragraph four in part:

"That while said "Nanking" was in the port of Honolulu aforesaid, at the time aforesaid, the said * * * * did land in the United States at the port of Homolulu aforesaid, and the owners, officers and agents of the said "Nanking" did not prevent the said * * * * from then and there landing in the United States;" (Record, p. 7)

these allegations were expressly admitted in paragraph three of the answer. (Record p. 21).

It was alleged in paragraph five of each count of the libel

"That at the time said * * * * landed at Honolulu as aforesaid said port of Honolulu had not been designated by any immigration officer of the United States where the said * * * * might land at the time said "Nanking" was docked at said port of Honolulu on said 1st and 2nd days of February, 1921, as aforesaid, and authority had not been given to the said * * * * nor to any of the owners, officers or agents of the said "Nanking" to permit the said * * * * to then and there land at said Honolulu aforesaid;"

these allegations were expressly admitted in paragraph four of the answer. (Record p. 21).

The answer further in paragraph two thereof, after making the admissions above set forth, proceeded to deny the conclusion of law in paragraph three of the libel that the owners, officers and agents of the "Nanking" were then and there charged with the duty to prevent the landing of said alien passengers at the port of Honolulu, although admitting that they were then and there required to exercise "all due and reasonable care and diligence and do all that reasonably lay within their power" to prevent such landing. And the answer, after making admissions of the quoted averments of paragraph four of the libel, proceeded to deny the conclusion of law of said paragraph, denying "that the owners, officers and agents of said 'Nanking' (or any of them) did unlawfully permit" said passengers to land as aforesaid.

Paragraph seven of each count of the libel proceeded to set forth the conclusion from the foregoing facts that the "Nanking," and her appurtenances, by virtue of said Act referred to, became subject to the penalty of \$1000.00. This statement, which may be deemed the conclusion of the law of the pleader, was also denied in the answer.

It was also alleged in paragraph six of each count of the libel that in the opinion of the Secretary of Labor of the United States it was impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the unlawful landing of the named passenger in the United States as aforesaid. The

only response to this averment in the libel is "claimant leaves libellant to its proof of the matters alleged in paragraph 6 of each of said counts of the libel."

In paragraph 7 of the answer the claimant proceeded to set forth in detail the theory of its defense as follows:

"And said claimant, further answering all and singular the matters alleged in said libel and in each of the said several counts thereof, says that it has a good and meritorious defense to the several claims set forth in said libel, to wit:

That the said four alien passengers escaped from the said vessel against the will and intent of the owner, officers and agents of the vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said alien Chinese from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other (22) officers and the owner of said vessel to prevent any passengers on said vessel from leaving said vessel, and none in fact did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigration at Honolulu, and that no alien or Chinese passengers did in fact leave said vessel over said gangway without exhibiting such pass; and

claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and properly issued by the United States Inspector of Immigration at said Honolulu, and approved by Castle & Cooke, Limited, (the then agents for said steamship company), to Chinese residents of Honolulu having lawful business on the vessels of said steamship company, which fraudulent use consisted in one or more of said passes (either with or without the connivance of the legitimate holders thereof therein named) having been given to one or more persons holding his or their own proper pass or passes, who took such other passes on board the vessel and there gave such other passes to the several Chinese who escaped, thereby enabling said escaping Chinese to use said passes as though their own, by falsely impersonating the person named in such pass, with the aid of wearing some article or articles of wearing apparel theretofore surreptitiously furnished to them by conning friends or agents and bearing some mark denoting the origin or purchase thereof in Honolulu, thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in the manner beyond the power of said steamship company to have anticipated and prevented; and also, as claimant is informed and believes, and proposes to prove in this cause, passes or permits were occasionally made out by the Inspector of Immigration at Honolulu for more than one person for Chinese of Honolulu desiring to visit on board

vessels in port and it would therefore be possible and easily practicable for such passes to be used by one or more persons less than the whole number of persons mentioned therein in boarding any vessel and then used to pass from the ship by the full number of persons therein mentioned; and that on February 1, 1921, while said steamship "Nanking" was in port at Honolulu, Chinese visiting them from Honolulu did board said vessel, over the regular gangway with passes issued by said Immigration Inspector, and, while claimant cannot allege or prove with certainty that any such double passes were in fact then used, claimant nevertheless alleges that the existence of such a situation would render possible the illegal landing of alien passengers, notwithstanding all efforts of the steamship company to prevent the same."

It is further contended in paragraph eight of the answer that the section of the Immigration Act in question is "unreasonable, harsh, and oppressive," and is "illegal and unconstitutional."

On the coming in of the answer, the libellant excepted thereto for that it was insufficient and contemptuous and did not constitute any defense to the libel and specified that the answer did not deny any material allegation of the libel, but that it admitted, in articles I, II, III and IV, thereof, all the material allegations, and further that the allegations of paragraph seven above set forth were irrelevant and contemptuous, and that none of the facts or said facts were relevant nor constituted a

defense, and that the allegations of Article VIII challenged the unconstitutionality of the Section of the Act in question, and stated the mere conclusion of the pleader. (Record, p. 27).

On November 16, 1921, the Court, after a hearing, sustained the exceptions to the answer and directed that unless complainant should amend its answer within ten days, a decree might be entered for the libellant according to the prayer of the libellant. The claimant elected in open court not to amend its answer or plead further. The court thereupon entered the final decree appealed from.

QUESTIONS INVOLVED

The appellant urges in its brief four specified points which it contends requires the reversal of the decree, viz:

(1) That Section 10 of the Immigration Act should not be taken as imposing an absolute duty to prevent aliens from landing, but that due diligence exercised to prevent it should constitute a defense, and that if otherwise construed the Section would be unconstitutional.

(2) That the allegation that in the opinion of the Secretary of Labor it was impracticable to prosecute the owners, etc., was put in issue and was not proven.

(3) That the aggregate penalties of \$4000.00 were excessive, it being urged that the single penalty of \$1000.00 would alone have been authorized.

(4) And that the case is not governed by the Immigration Act, but that it comes under the Chinese Exclusion Act.

But the question more particularly involved is; Did the court err in sustaining the exceptions to the answer? As to the proper solution of this question, the points urged may have more or less pertinency.

ARGUMENT.

I.

THE DUTY RESTING UPON THE OWNER OF A STEAMSHIP BRINGING ALIENS TO THE UNITED STATES TO PREVENT SUCH ALIENS FROM LANDING AT A TIME OR PLACE OTHER THAN AS DESIGNATED BY IMMIGRATION OFFICERS IS ABSOLUTE; IT IS NOT EXCUSED BY ANY SHOWING OF LACK OF NEGLIGENCE IN THAT BEHALF.

In the case at bar there have arisen two conflicting theories as to the character of the duty imposed by section 10 of the Immigration Act upon steamship companies. It is contended by the government that such duty is absolute, and that it cannot be excused by any showing of the exercise of care or the want of negligence in the premises. On the other hand, the China Mail Steamship Company, the claimant of the libeled steamship claims that this duty is not absolute, that an unlawful landing may be excused

by showing the exercise of diligence, and that although a steamship company may afford facilities for an alien to come to one of the harbors of the United States, and does not prevent such alien from landing contrary to law, it may, nevertheless, be excused from the penalties imposed upon a showing that its officials or some of them, exercised ordinary care. These two conflicting views indicate the principal question to be decided on the instant appeal.

It is undisputed that the allegations of the libel brought the owners of the "Nanking" squarely within the terms of the section 10 of the Immigration Act. It was alleged that while the "Nanking" was a common carrier of passengers, it was transporting from Hongkong to Mazatlan through San Francisco a certain alien passenger named, and that on or about February 1st or 2nd, 1921, while the steamer was docked at the port of Honolulu the alien passenger landed and that the owners of the "Nanking" did not *prevent* his landing, and that he landed at a place not designated by any immigration officer. If the duty was absolute or in other words if the statute meant what it clearly said, the steamship company thereby incurred the penalty imposed by Section 10 of the statute. These facts were expressly admitted in the answer tendered. It could not have been denied nor was it denied that the steamship company *failed to prevent the landing*, at a place *not designated, of the alien* in question. The landing is sought to be excused by a showing of the exercise of reasonable care and diligence or more

particularly by a showing of the matters stated in the answer to the libel in paragraph VII thereof. It thus appears that the tendered answer sought to raise the alleged defense of the exercise of due care. Whether the company would have been excused if the landing had occurred through "*vis major*" or "inevitable accident"—if such would constitute a defense—is not involved.

That Congress intended in enacting Section 10 of the Act of February 5, 1917—The Immigration Act—to alter the rule in question so as to make the duty absolute, appears abundantly from a consideration of the course of legislation. It may be useful to state the previous law on the subject Section 8 of the Act of March 3, 1891, 26 Stat. page 1085, was as follows:

"It shall be the duty of the officials, or officers, and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent who shall either *knowingly* or *negligently* land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor."

In the Immigration Act of February 20, 1907, Section 18 dealing with the same subject, was as follows:

"That it shall be the duty of the owners, officers, or agents of any vessel, . . . to prevent

the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the *negligent* failure of any such owner, officer or agent to comply with the foregoing provisions shall be deemed a misdemeanor" etc.

The Act of March 3, 1891, cited above, was considered by the Supreme Court of the United States in the case of Hackfeld & Co. vs. United States, 197, U. S. 442, 49 Law Ed. 826, The court there said:

"The statute imposes upon one who has brought immigrants into the United States not permitted to land here the duty of returning them to the place from whence they came, with a penalty by fine in case the duty is neglected. If by this requirement it was intended to make the shipowner or master an insurer of the absolute return of the immigrant, at all hazards, except when excused by vis major, or inevitable accident, it would seem that Congress would have chosen terms more clearly indicative of such intention, and, instead of using a word of uncertain meaning, *would have affixed the penalty* in cases wherein the *owner* or master *omitted* or *failed* to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel, but had permitted the escape, either with or without fault upon his part."

Apparently Congress acted upon the very suggestion of the court and amended the statute so as to

make the duty of the steamship company turn on the meaning of the word "fail" and enacted the statute in its present form which reads as follows:

Sec. 10. "That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of any such person, owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officers, or agent of any such vessel, a penalty of \$1000 shall be a lien upon the vessel whose owner, master, officer or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

(Act of February 5, 1917, 39 Stat. 881).

There can be no reasonable contention that Congress did not intend by the new enactment to make

the duty absolute which theretofore had been relative.

This is shown by a consideration of a portion of the history of the enactment of the Immigration Law of 1917. While the act was being debated in the House of Representatives under the five minute rule, an amendment was offered by Mr. Bennett, a representative from New York, which would have had the effect of restoring the word "negligent" to the section. It was urged in the debate, in response to the proposed amendment, that a change in the law was sought in a report of the Commissioner of Immigration, and was intended and desirable, and the amendment was voted down. See Congressional Record of 64th Congress, first session, Vol. 53 Pt. 5, pages 5028 to 5030, as of the date March 28, 1916. The Act in question was numbered H. R. 10384, and the report of the House Committee on Immigration in explanation and support of the legislation was Report No. 352.

In the case of
Taylor v. United States 152 Fed. 1,

the court referred to the history of the legislation involved and showed that Congress in a later statute made use of the words "any alien" instead of the words "alien immigrant" used in the earlier enactment, and held that the change was very significant in considering the meaning of the language used in the later statute. And the court said that the proceedings before Congress during the passage of

the bill clearly indicated that Congress was satisfied that the use of the word "immigrant" had given rise to the construction of the earlier acts which rendered them inadequate to accomplish their purpose, and made it necessary to adopt the broader term. That case was also cited in the subsequent case of

Ex Parte Hoffman 179 Fed. 839 in which the same court reiterated the principle.

In the case of

Lapina v. Williams, 232 U. S. 78, 58 Law Ed. 515,

the Supreme Court of the United States after a consideration of the course of proceedings before Congress applied the same reasoning and referred with approval to the enunciation of the same principle in the case of

Taylor v. U. S. Supra,

and although noting that the Taylor case had been reversed by the Supreme Court upon an appeal thereto, pointed out that the reversal was based upon a different ground, to wit, that section 18 did not apply to an ordinary case of a sailor deserting while on shore leave. It is apparent from a consideration of the opinion in the Lapina case that the reasoning in regard to the inference to be drawn from a consideration of the legislative history was approved.

So in the case at bar, it is obvious that when Congress deliberately altered the language of the

Immigration Act so as to strike out the word "negligent" and leave what had previously read "the negligent failure" to read simply "the failure" etc., there was intended to be accomplished a substantial change in the law, and that under the later act the duty to prevent a landing was absolute, and was more than simply to be free from negligence.

In the case of
The Ivor Heath 275 Fed. 67,

there was a claim made for the recovery of a penalty against a steamship for bringing in smoking opium not shown on its manifest. It was urged that it was a hardship to impose upon the owners of the vessel such a severe liability when there existed no guilty intent or knowledge on their part. But the Court cited with approval the early cases of

The Queen, 27 Fed. Cs. 672, No. 16108, and
The Helvetia, 11 Fed. Cs. 1061, No. 6345,

as authority to the effect that it was not a defense that the master of the vessel had no knowledge or information in the premises or that he took all precautions in his power to prevent smuggling. The Court quoted from the decision of Judge Woodruff in the former case that

"If it were to be so held the door to smuggling would be open so wide that these statutes would be a dead letter."

Thus from experience in the practical application of these and similar statutes, the Congress has real-

ized that if such acts and similar acts are to be of any practical effect, the duty to be imposed upon steamship companies to prevent smuggling or unlawful landing of aliens must be made absolute in certain cases and that in enacting Section 10 of the latest Immigration Act above quoted, Congress had such an intent to so make the duty incumbent upon owners of steamships bringing aliens to an American port to prevent unlawful landing an absolute duty.

We submit these general observations, yet in truth the strongest argument is to cite the very language of the statute involved. It does not admit of construction; the duty imposed is to *prevent the landing*, etc., failing the performance of which duty the penalty is incurred. The terms made use of by the Congress in the present statute inevitably impose an absolute duty.

Finally the suggestion is advanced that the statute if so construed is unconstitutional. But the argument is not developed at length nor supported by authority. Nor is any particular provision of the constitution pointed out that can be said to be violated. The owners of steamship companies incurring the penalty in question are afforded due process of law before they are required to pay the penalty. They are not obliged to engage in the business of bringing immigrants to the United States, and the Congress can absolutely prohibit any and all immigrants from being brought. It can thus allow their bringing in upon terms and no constitutional

provision is violated when it is enacted that no steamship company can bring aliens to an American port except upon the terms that they absolutely insure that such immigrants shall not be landed contrary to law.

The principle of the legislation is not confined to the instance case. It has been found upon experience to be necessary and it has been applied to other similar situations so that if the law in the instant case were held unconstitutional it would have far reaching implications, and would nullify such legislation as that contained in the Opium Act and in various Customs statutes providing for such penalties as make the ship owners or importers insurers of a compliance with the law in cases where they have some manner afforded facilities for its violation. That legislation of this character is not invalid has been decided by the Supreme Court of the United States in the case of

Goldsmith Jr. Grant Co. v. United States, 254 U. S.
505, 65 L. ed. 376, 378.

The suggestion that it will render it difficult for American steamship owners to do business or compete with rivals may be disregarded for the statute bears equally upon all steamship companies, foreign or American.

Nor were the owners of the vessel free from negligence; on their own showing they knew they were carrying alien immigrants of a class excluded from the United States. They were affording facilities

to such immigrants to go from Hongkong to Mazatlan, Mexico, through San Francisco—a voyage in itself suspicious; they were bound to suspect that such immigrants were seeking ultimately to enter the United States and meant to so enter immediately if possible. They allowed such immigrants to mingle freely with residents of Honolulu of the same race and appearance, and yet took no precaution to identify the one from the other. No blame can be attached to immigration officials; they had issued passes for their own purposes to allow the return of residents of Honolulu who might have business aboard. It is not contended that they gave any directions or permission to the passengers in question to land, for the allegations of the libel that such permission was not given are admitted. Apparently, the master of the vessel failed to adopt the obvious precaution of taking up the passes on entering and issuing checks. If such conduct be called the exercise of due diligence in the premises it would open wide the door to the entry of excluded classes.

II.

THE AUTHORITY OR DIRECTION OF THE SECRETARY OF LABOR TO PRO- CEED IN ADMIRALTY TO RECOVER THE PENALTY INSTEAD OF PROSE- CUTING THE OWNERS CRIMINALLY WAS NOT AN ISSUE.

It is further contended by appellant that there was in issue the question of the opinion of the Secre-

tary of Labor that it was impracticable or inconvenient to prosecute the owner criminally, and that therefore the vessel should be libeled for a penalty, and it is said that such allegation was not proved. Had the case been tried, it would no doubt have been deemed of minor importance, not going to the merits and it probably would have been ignored by the parties. In fact it may be reasonably urged that the matter never constituted a formal issue to be tried, any more than the question of the authority of the United States Attorney to appear in any case, which is presumed.

But the point is not available in the instant case because while the libel contained the formal allegation in proper form the cause assumed such a status that the libelant became entitled to proceed as upon a default. As we have seen, the exceptions to the answer to the libel were properly sustained. This displaces the answer for all purposes. Under Admiralty Rule No. 30, it is provided that when exception is properly taken to the answer and the exception is allowed, the Court may by attachment compel the defendant to make further answer thereto or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer as if no answer had been put in thereto. Here the exception was, among grounds, upon the ground that the answer did not deny any material allegation of the libel. Under Admiralty Rule No. 27 it is provided that the answer shall be *upon oath*

or solemn affirmation, and shall be *full* and *explicit* and *distinct* to each separate article and separate allegation in the libel. Tested by this rule the answer was insufficient even in respect of the allegation of the authority of the Secretary to proceed; for the answer neither admits nor denies the averment, nor does it state that the pleader has no knowledge or belief in the premises, nor that it is ignorant of the truth of the allegations. It merely states that it leaves libellant to its proof of the matters alleged, which means nothing, as was held in the case of

O'Keefe v. Staples Coal Co. 201 Fed. 135, 137,

In that case it appeared that in certain articles of an answer the respondents neither admitted nor denied certain allegations of the petition and left the petitioner to make such proof of the same as might be material. The Court said that it was nowhere stated that the respondents were ignorant of the truth of the allegations thus treated, and further that unless really ignorant they were bound to either admit or deny. We submit that the answer in respect to the matter referred to was not "on oath" or "full" or "explicit" or "distinct" or according to the rules of pleading, and that it was properly disregarded. Exceptions having been sustained to the answer, the claimant having refused in open court to amend, the court properly proceeded as upon a default.

III.

SEPARATE PENALTIES IN THE CASE
OF EACH ESCAPING ALIEN PASSEN-
GER WERE PROPERLY IMPOSED.

It is contended that the penalties imposed were grossly excessive. As to whether the penalty in the case of each escaping passenger should have been the maximum or less would at least be a matter within the discretion of the trial court, and cannot now be questioned. But the more particular contention of appellant seems to be that there should have been a single penalty. But the very language of Section 10 of the Act is against appellant's contention. The duty imposed is one respecting each single alien, and is to prevent his landing unlawfully and the failure to comply with that duty renders the owner subject to the penalty of a thousand dollars. The Act is so drawn as to relate to each individual passenger and not to any particular voyage. See Pollock vs. Steamboat Sea Bird, 3 Fed. 573, 576.

For ought that appears from the record, the escapes in question may indeed have been entirely separate and distinct, the averments of the libel would so imply.

IV.

**THE INSTANT CASE IS GOVERNED BY
THE IMMIGRATION ACT AND NOT BY
THE CHINESE EXCLUSION ACT.**

The language of the Immigration Act does not declare any exceptions; by its terms it applies to any alien immigrant that comes within its terms, and it cannot be disputed that the alien immigrants in the instant case were within its terms; whether on other matters the particular aliens would have been within the Chinese Exclusion Act is not material. We think the point has been decided against the contention of appellant in the case of

U. S. vs. James Butt, 257 U. S. 38, 65 L. Ed. 119.

And the same point was so decided in the earlier case of

U. S. vs. Wong You, 223 U. S. 67 56 L. Ed. 354.

There the court speaking of the Immigration Act of February 20, 1907, 34 Stat. 898, said that by the language of the Act any alien that enters the country unlawfully may be summarily deported upon the order of the Secretary of Commerce and Labor at any time within three years, and that it seemed unwarranted to exempt the Chinese from this liability because there was an earlier more cumbrous proceeding which this partly overlaps.

CONCLUSION.

In conclusion, it is submitted that upon the conceded facts of the instant case penalties were properly imposed, and that the judgment of the District Court of Hawaii is proper and well based in law and should be affirmed.

JOHN T. WILLIAMS,
United States Attorney,

T. J. SHERDIAN,
Assistant United States Attorney,

WM. T. CARDEN,
United States Attorney, Hawaii,
Attorneys for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDowell
MOTOR COMPANY,

Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

FILED
MAY 29 1922
F. D. MONKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDowell MOTOR COMPANY,

Plaintiff in Error,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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Attorneys for Libelant and Defendant in
Error.

Messrs. GRIMSTAD & BROWN, of Billings, Mon-
tana,

Attorneys for Intervenor and Plaintiff in
Error.

UNITED STATES OF AMERICA,

Libelant,

vs.

**ONE HUDSON AUTOMOBILE, Tools and Acces-
sories, and A. J. STUPER,**

Libelee,

and

**E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDowell
MOTOR COMPANY,**

Intervenor.

BE IT REMEMBERED, that on August 1st, 1921,
a Libel of Information was duly filed herein, being
in the words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

In the District Court of the United States, District
of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4½ Goodyear Tire on Right Rear Wheel, One 34 x 4½ Goodyear Tire on Left Front Wheel, One 34 x 4½ Goodyear Tire on Left Rear Wheel, One 34 x 4½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34 x 4½ Innertube, One Set 34 x 4½ Chains, and A. J. STUPER,

Libelee.

Libel of Information.

BE IT REMEMBERED, that W. H. Meigs, Assistant United States Attorney in and for the District of Montana, who, for the United States, in its behalf prosecutes, comes here in person into the District Court of the United States for the District of Montana, and informs the Court and gives it to understand:

That the United States of America hereby brings

suit against that certain conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and one 34 x 4½ Goodrich Silvertown cord tire on right front wheel, one 34 x 4½ Goodyear tire on right rear wheel, one 34 x 4½ Goodyear tire on left front wheel, one 34 x 4½ Goodyear tire on left rear wheel, one 34 x 4½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey wrenches, three hammers, two pairs pliers, four end wrenches, one [2] storage battery, one spotlight, one 34 x 4½ inner tube, one set 34 x 4½ chains, hereinafter mentioned as tools and accessories, which said automobile and tools and accessories are now in the hands of H. M. Dengler, an officer of the United States, and a Deputy Collector of Internal Revenue in the State and District of Montana, having been seized by John MacLeod, Sheriff of Big Horn County, in the said State and District of Montana, and which said conveyance and said tools and accessories, the said John MacLeod did on the 31st day of January, 1921, seize and secure as liable to seizure and forfeiture under the provisions of the Internal Revenue laws of the United States, said conveyance being then and there used in the removal of goods and commodities, to wit, distilled spirits, in respect whereof a tax is imposed by law, with intent to defraud the United States of such tax.

That the Assistant United States Attorney alleges

and particularly propounds as grounds and cause for said forfeiture;

1. On or about the 31st day of January, 1921, near the City of Hardin, in the County of Big Horn, in the State and District of Montana, A. J. Stuper did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, a quantity of distilled spirits, to wit, whiskey, the exact quantity of which is to the libelant unknown, the same being then and there goods for and in respect whereof a tax was then imposed by law, to wit, the Internal Revenue Tax then imposed by law on distilled spirits, he, the said A. J. Stuper then and there intending to defraud the said United States of said tax on the said distilled spirits, so removed as last aforesaid;

2. That A. J. Stuper claims some right, title or interest in and to the said conveyance, to wit, one Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, used in [3] the removal of the said distilled spirits, and which contained said distilled spirits, and in said tools and accessories, and in said goods and commodities, to wit, whiskey, the exact quantity of which is to the libelant unknown;

3. That said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, was seized on the 31st day of January, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue

Laws of the United States, by John MacLeod, Sheriff of Big Horn County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful removal of distilled spirits aforesaid;

4. That said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and said tools and accessories, are now subject to seizure;

WHEREFORE, the said Assistant United States Attorney for the District of Montana, who prosecutes as aforesaid for the United States, prays that due process of law may be awarded in this behalf, to enforce the forfeiture of the said conveyance, to wit, One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and said tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process, to show cause, if any they have, why said forfeiture should not be adjudged.

W. H. MEIGS,

Assistant United States Attorney, District of Montana. [4]

United States of America,
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the con-

tents thereof, and that the same is true to the best of his knowledge, information and belief.

W. H. MEIGS.

Subscribed and sworn to before me this 1st day of August, 1921.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court, District of Montana.

Filed August 1, 1921. C. R. Garlow, Clerk.

That thereafter, on August 1st, 1921, order for process and publication was duly filed herein, being in the words and figures following, to wit: [5]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4½ Goodyear Tire on Right Rear Wheel, One 34 x 4½ Goodyear Tire on Left Front Wheel, One 34 x 4½ Goodyear Tire on Left Rear Wheel, One 34 x 4½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End

Wrenches, One Storage Battery, One Spotlight, One 34 x 4½ Innertube, One Set 34 x 4½ Chains, and A. J. STUPER,

Libelee.

Order for Process and Publication.

A libel of information having been filed in the above-entitled court in the above-entitled cause, on the 1st day of August, 1921, and being fully advised of the law and the facts, and it appearing therefrom to be a proper case therefor, now therefore,

IT IS ORDERED, and THIS DOES ORDER:

I.

That said libel of information is hereby set for trial and hearing before the above-entitled court at the courtroom thereof in the City of Great Falls, in the State and District of Montana, on the 1st day of September, 1921, at the hour of ten o'clock in the forenoon of said day.

II.

That process in due form of law issue against the property [6] described in said libel of information to enforce a forfeiture of said property.

III.

That notice of the time and place of trial and hearing on said libel of information be given to all persons interested in said property, by causing the substance of said libel, with the order of the Court setting the time and place appointed for said trial, and hearing to be published in "The Tribune," a newspaper of general circulation published at Hardin, in the State and District of Montana, and near the place where said property was seized, and by post-

ing the same in three public places in the City of Great Falls, in the State and District of Montana, for the period of fourteen (14) days prior to the time set for said trial.

Dated this 1st day of August, 1921.

BOURQUIN,
Judge.

Filed August 1, 1921. C. R. Garlow, Clerk.

Thereafter, on August 30, 1921, motion for leave to intervene and intervenor's petition was duly filed herein, being in the words and figures following, to wit: [7]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4 $\frac{1}{2}$ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Right Rear Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Rear Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches,

Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34 x 4½ Innertube, One Set 34 x 4½ Chains, and A. J. STUPER,

Libelee,
and

E. P. McDOWELL, Doing Business Under the Firm Name Land Style of E. P. McDowell MOTOR COMPANY,

Intervenor.

Motion for Leave to Intervene.

Comes now E. P. McDowell and moves the Court for leave to intervene as party defendant in the above-entitled action, and represents to the Court as follows, to wit:

I.

That E. P. McDowell is now, and was at all times hereinafter mentioned doing business under the firm name and style of E. P. McDowell Motor Company, and is now and was at all the times hereinafter mentioned engaged in the business of selling automobiles, with his place of business at Billings, Montana. [8]

II.

That on or about the 1st day of August, 1921, a libel of information was filed in the above-entitled court against a certain conveyance, to wit: One Hudson Automobile, License No. 57695, Montana, 1920, Engine No. 91473, Car No. 32512, and one 34 x 4½ Goodrich Silvertown Cord tire on right front

wheel, one 34 x 4½ Goodyear tire on right rear wheel, one 34 x 4½ Goodyear tire on left front wheel, one 34 x 4½ Goodyear tire on left rear wheel, one 34 x 4½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey wrenches three hammers, two pairs pliers, four end wrenches, one storage battery, one spotlight, one 34 x 4½ inner tube, one set 34 x 4½ chains, all of which will be hereinafter designated and mentioned as tools and accessories, which automobile, tools and accessories are now in the hands of H. M. Dengler, an officer of the United States and a deputy collector of internal revenue in the State and District of Montana, all of which are more fully set forth in the libel of information, to which reference is hereby made.

III.

That E. P. McDowell, doing business as E. P. McDowell Motor Company, is now and was at all times hereinafter mentioned the holder of the legal title to said automobile, tools and accessories, as hereinafter more fully set forth, to wit:

(a) That on December 3, 1920, at Billings, Montana, said intervenor sold to A. J. Stuper, mentioned in the libel of information, the automobile, tools and accessories hereinbefore mentioned, and that on said date he took from said A. J. Stuper a conditional sales contract for the unpaid balance thereof, which at that time [9] was Fourteen Hundred

Eight Dollars (\$1408.00), a copy of which conditional bill of sale is hereto attached, marked Exhibit "A," and made a part of this plea of intervention; that subsequent to the signing and execution of said conditional bill of sale and prior to the time it was seized, as set forth in the libel of information, your intervenor caused the same to be filed for record in the office of the County Clerk and Recorder of Deeds for Yellowstone County, Montana, where the same is of record, and has ever since been of record; that said conditional bill of sale has been in force ever since its execution, and that there is now due and owing from A. J. Stuper to the intervenor the sum of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that no part of said sum of Fourteen Hundred Eight Dollars (\$1408.00), or interest thereon has been paid to the intervenor by A. J. Stuper, or anyone else acting for him, and that there is now due and owing said intervenor said sum and interest, and that the same is a valid enforceable claim.

IV.

That at the time said sale was made to A. J. Stuper by the intervenor, as hereinbefore set forth, the intervenor had no knowledge or information that said automobile, tools and accessories were to be used to convey distilled liquors, and that the intervenor has not been at any time, or is he now acting in collusion with the said A. J. Stuper, or any of the other libelee.

V.

That said intervenor further represents and states as a fact that said automobile, tools and accessories were not being used by said A. J. Stuper, on or about the 31st day of January, 1921, or at [10] all, for the purpose of removing distilled spirits with intent to defraud the United States of America of any revenue tax, or at all, and in this behalf he alleges that said automobile, tools and accessories are not liable to forfeiture and seizure under the provisions of the Internal Revenue Law of the United States of America, or at all, and further alleges that said automobile, tools and accessories was not at any time, or at all, seized by any officer of the United States of America, but that the same was taken from A. J. Stuper by the Sheriff of Big Horn County, Montana, and that he was not at that time, or at all, and particularly at the time of the alleged seizure, to wit: January 31, 1921, an officer of the United States of America authorized to seize the same.

VI.

Intervenor further denies that said automobile, tools and accessories mentioned in said libel of information are subject to forfeiture and seizure, and denies, generally, each and every allegation contained in said libel of information.

Said E. P. McDowell further represents to the Court:

I.

That said libel of information is insufficient on the face thereof to constitute a valid claim against

said automobile, tools and accessories mentioned there in for the reason that it shows upon the face of the same that said automobile, tools and accessories were seized by virtue of the provisions of the Internal Revenue Laws of the United States of America, and that said laws have been repealed by the law designated and known as the National Prohibition Act, or the Volstead Act, and that said seizure and forfeiture is therefore void, illegal and of no force and effect. [11]

II.

That said A. J. Stuper, who it is alleged was in possession of said automobile, tools and accessories on the 31st day of January, 1921, when it was seized, as set forth in said libel of information, has never been convicted of the crime of transporting and removing said distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, as set forth in said libel.

WHEREFORE, said E. P. McDowell, doing business under the name of E. P. McDowell Motor Company, prays as follows, to wit:

- (1) That his claim of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, be allowed as a valid and existing claim against said automobile, tools and accessories, and that he be paid said sum out of any proceeds derived from the sale of said automobile, tools and accessories, and that said claim be a prior one over and above any claim of the United States of America.
- (2) That said libel of information be dismissed.

(3) That the court make and enter herein an order permitting said E. P. McDowell to intervene in said cause, and that this plea of intervention be the plea of said E. P. McDowell.

(4) For such other and further relief, general or special, legal or equitable, as he may be entitled to.

E. P. McDOWELL,

Intervenor.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

His Attorney. [12]

State of Montana,

County of Yellowstone,—ss.

E. P. McDowell, being first duly sworn, deposes and says:

That he is the intervenor hereinbefore mentioned, and that he has read the above and foregoing petition for intervention and knows the contents thereof, and that the matters and things therein contained are true.

E. P. McDOWELL.

Subscribed and sworn to before me this 29th day of August, 1921.

[Seal] O. KING GRIMSTAD,
Notary Public for the State of Montana, Residing
at Billings, Montana.

My commission expires Jan. 12, 1923. [13]

Exhibit "A."**NOTE AND CONDITIONAL BILL OF SALE.
\$1408.00**

Billings, Montana, Dec. 3, 1920. No. —

For value received, I, we or either of us, jointly and severally promise to pay to the order of E. P. McDowell Motor Company, at its office in the City of Billings, Montana, the sum of Fourteen hundred and eight and no/100 Dollars (\$1408.00), as follows: one hundred seventy-six dollars on the fourth day of each and every month for eight months, with interest thereon at the rate of 10 per cent per annum, payable monthly from date until paid, with all costs of collection and reasonable attorney fees in case payment is not made at maturity. The makers and endorsers hereby waive presentment, demand, protest and notice thereof. The consideration of this obligation is that the said E. P. McDowell Motor Company has delivered and agreed to sell to the undersigned the following personal property, to wit: Hudson speedster 11-0-32512, motor 91473.

Provided, however, that the title and ownership of the said property shall be and remain in the said E. P. McDowell Motor Company until full payment is made of the amount set forth and upon such payment being made the undersigned shall be the owner of said property.

In the event of failure to pay this note, or any payments or interest thereon when due, or if the said property is not properly cared for, or if it is

seized or levied upon or sold or removed, or if any attempt is made to sell or remove it from the County of Yellowstone, State of Montana, without the written consent of said [14] Company, the said Company, its agents, successors or assigns, may take immediately, by an action in claim and delivery, as provided by law, recover the possession of said property wheresoever located, or the sheriff of the county where said property may be located, when so authorized by the said E. P. McDowell Motor Company, its agents, successors or assigns, may take possession of the said property and sell the same after notice given therefor, for such time and in the manner provided by law for sheriff's sale of personal property under execution, and apply the proceeds thereof.

First: To the payment of the expenses of such sale, including attorneys' fees; and

Second: to the amount due on the foregoing note and the remainder, if any, shall be paid to the vendee.

Said taking and sale shall not relieve the undersigned from paying the balance due on this note, should a deficiency arise after said sale, and the said Company, may, at its option, retain said property and all payments made on this note, in satisfaction thereof, and all sums which have been made shall be and remain the property of the said company, the same being considered as the reasonable rental value of said property.

A. J. STUPER.

Postoffice Miles North,
County Miles East,
Sec.... Township.... Range.... Miles South,
Witness to signature: Miles West,

E. P. McDOWELL Of Billings.

Filed August 30, 1921. C. R. Garlow, Clerk. [15]

Thereafter, on January 26, 1922, leave to intervene was granted herein, the minute entry thereon being as follows, to wit:

In the District Court of the United States, in and
for the District of Montana.

No. 938.

UNITED STATES

vs.

ONE HUDSON AUTO and A. J. STUPER.

Order Granting Leave to Intervene.

Comes now W. H. Meigs, Esq., Assistant U. S. Attorney, and states to the Court that the plaintiff herein consents to the petition of E. P. McDowell to intervene herein as to the automobile involved, whereupon Court ordered that said petition to intervene be filed, the case not to be set for trial at present.

Entered in open court January 26, 1922.

C. R. GARLOW,
Clerk.

Thereafter, on March 9, 1922, a stipulation and agreed statement of facts was duly filed herein, being in the words and figures following, to wit:
[16]

In the District Court of the United States, District
of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34x4½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34x4½ Goodyear Tire on Right Rear Wheel, One 34x4½ Goodyear Tire on Left Front Wheel, One 34x4½ Goodyear Tire on Left Rear Wheel, One 34x4½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34x4½ Innertube, One Set 34x4½ Chains, and A. J.
STUPER,

Libelee,

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated and agreed by and between John L. Slattery, Esq., United States District Attorney for the District of Montana, for and on behalf of the United States of America, in the above-entitled matter, and Messrs. Grimstad & Brown, for and on behalf of the claim of E. P. McDowell in the above-entitled matter, that the following facts are hereby admitted as true and are hereby submitted to the Court for Judgment thereon:

I.

That A. J. Stuper did on the 31st day of January, 1921, near the City of Hardin, County of Big Horn, State and District of Montana, have possession of One Hudson Automobile, License [17] No. 57695 Montana 1920, Engine No. 91473, Car No. 32512, together with the tools and accessories described in the information on file herein, and that at that time the said A. J. Stuper had a quantity of distilled spirits, to wit, whiskey, in said automobile and that he was transporting, removing, and concerned in removing the same, by means of said Hudson Automobile, tools and accessories, as mentioned in said libel of information, without first obtaining a permit entitling him so to do, and paying the Internal Revenue tax due thereon; the said whiskey then and there so transported and removed being distilled spirits in respect whereof a tax then was imposed by law, to wit, the Internal Revenue tax imposed by law on distilled spirits, and then

and there due and unpaid; that said Hudson Automobile and tools and accessories were taken by the plaintiff, by and through its proper officers, and that they are now in the possession of plaintiff, its officers and agents.

II.

That at the time said automobile, tools, and accessories, as mentioned in said libel of information, were taken into the possession of the United States of America that E. P. McDowell, the intervenor herein, had a valid and existing claim against said automobile, tools and accessories in the sum of fourteen hundred eight dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that said claim of the said E. P. McDowell was represented by a conditional bill of sale, he having sold said automobile, tools and accessories to the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time of the seizure thereof; that said conditional bill of sale was signed and executed by the said A. J. Stuper and was *bona fide* in all respects, and was placed on record in the office of the [18] County Clerk and Recorder of Deeds for Yellowstone County, Montana, on the 7th day of December, 1920, which is the County where said E. P. McDowell is doing business and where said automobile, tools and accessories were sold; that said sale was in all respects fair and legal and was not made with any knowledge or information of any kind whatsoever on the part of the said E. P. McDowell that the said A. J. Stuper

intended to, or had any intentions of any kind to use the same to transport distilled spirits in violation of the laws of the United States of America.

III.

That said automobile, tools and accessories were taken from A. J. Stuper, at the time and manner mentioned in said libel of information, by John Macleod, who was at that time Sheriff of Big Horn County, Montana, and that he was not at that time, or at all, an officer of the United States of America, but at said time was acting in his capacity as a Sheriff of Big Horn County, Montana.

IV.

That the whiskey so being removed and transported in said Hudson Automobile, at the time said Hudson Automobile, tools and accessories were seized, was Canadian whiskey, then and there and theretofore imported into the United States and upon which the Internal Revenue tax therefor had not been paid.

V.

That after said automobile, tools and accessories were seized by the said Sheriff of Big Horn County, Montana, it was at a subsequent date thereof duly turned over to the officers of the United States of America, together with the [19] distilled spirits found in said automobile.

VI.

That the libel of information as filed herein is prosecuted by reason of the violation of the Internal Revenue Laws of the United States of America, and not by reason of any violation of the National

Prohibition Act, which is commonly known as the Volstead Act.

VII.

That the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time they were seized, has never been convicted of the crime of transporting and removing distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, or at all.

VIII.

That a true and correct copy of said conditional sales contract is attached to the answer of E. P. McDowell filed in said cause, and that said sum, to wit: Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at ten per cent annum from December 3, 1920, was due and owing the said E. P. McDowell from the said A. J. Stuper at the time said automobile, tools and accessories were taken from the said A. J. Stuper, as set forth in said libel of information, and that said sum and interest is now due the said E. P. McDowell, and has not been paid, and that the same would be a valid lien against said automobile, tools, and accessories, if the same were sought to be forfeited under the laws of the State of Montana, and that the said E. P. McDowell has no other means of collecting or enforcing said claim.

Signed and dated this 3d day of March, 1922.

JOHN L. SLATTERY,

United States Attorney, District of Montana.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for E. P. McDowell, Intervenor.

Filed March 9, 1922. C. R. Garlow, Clerk. [20]

Thereafter, on March 10, 1922, said cause came on regularly for trial, the minute entry thereof being as follows, to wit:

In the District Court of the United States in and for the District of Montana.

No. 938.

UNITED STATES

vs.

ONE HUDSON AUTO and A. J. STUPER.

Trial.

This cause came on regularly for trial this day, John L. Slattery, Esq., U. S. District Attorney, appearing for the United States, and O. King Grimstad, Esq., appearing for the intervenor. Thereupon the cause was submitted to the Court upon the agreed statement of facts filed herein. Thereupon counsel for the intervenor moved the court for a verdict in favor of said intervenor upon the ground that section 3450 R. S. U. S. has been repealed by the National Prohibition Act, upon which the cause was submitted to the court. Thereupon,

after due consideration, court ordered that decree be entered herein in favor of the United States as pray for, to which rulig of the Court the intervenor then and there excepted and exception noted.

Thereupon counsel for the intervenor gave oral notice of appeal and the court fixed the cost bond on appeal in the sum of Three Hundred Dollars.

Entered in open Court March 10, 1922.

C. R. GARLOW,
Clerk.

Thereafter, on March 13, 1922, decree was duly filed and entered herein, being in the words and figures following, to wit: [21]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4 $\frac{1}{2}$ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34x4 $\frac{1}{2}$ Goodyear Tire on Right Rear Wheel, One 34x4 $\frac{1}{2}$ Goodyear Tire on Let Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Rear Wheel, One 34 x 4 $\frac{1}{2}$ Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers,

Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34 x 4 $\frac{1}{2}$ Innertube, One Set 34 x 4 $\frac{1}{2}$ Chains, and A. J. STUPER,

Libelee,^s

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Decree.

This cause having come on regularly for trial before the Court, without a jury, John L. Slattery, Esq., United States Attorney, appearing as counsel for the United States of America, the libelant, and O. King Grimstad, Esq., appearing as counsel for libelee^s and intervenor, and an agreed statement of facts dated March 3, 1922, and signed by the above named counsel respectively, having been duly filed herein, which agreed statement is ordered to be made a part of the record in this cause;

And thereupon, neither party desiring to introduce additional evidence, and neither party requiring a jury, by consent of the parties, this cause was submitted to the Court, in lieu of a jury, and upon said agreed statement of facts, for its consideration and judgment; [22]

And it appearing to the Court that a libel of information in the above-entitled cause was duly filed before this Honorable Court on the 1st day of August, 1921, and that in pursuance thereof there was issued out of this Court on said day an order for

hearing on said libel of information, and that process in due form of law issued against the property described in said libel of information to enforce forfeiture thereof, and that notice of the time and place of said hearing was duly given to all other persons interested in said property by publication of the substance of said libel in due form of law; and

It appearing that said process was duly served and publication made in pursuance of said order; and

It further appearing to the Court that all the allegations contained in the libel of information herein are admitted as true by the said agreed statement of facts on file herein, and the Court being now fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That the property herein described, to wit, one Hudson Automobile, License No. 57695 Montana, 1920, Engine No. 91473, Car No. 32512; and one 34 x 4½ Goodrich Silvertown Cord tire on right front wheel, one 34 x 4½ Goodyear tire on right rear wheel, one 34 x 4½ Goodyear tire on left front wheel, one 34 x 4½ Goodyear tire on left rear wheel, one 34 x 4½ Goodyear tire on side of car, one bumper in front, one short handle shovel, one full set side curtains, one auto jack, one tire pump, one demountable rim wrench, three small monkey-wrenches, three hammers, two pairs pliers, four end wrenches, one storage battery, one spotlight one 34 x 4½ inner tube, one set 34 x 4½ chains, be, and the same are hereby declared to be condemned and forfeited to the United States of America, and

that the same be sold at a public place in the City of Hardin, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, [23] for cash by said United States Marshal for the district of Montana; that the said Marshal shall give fifteen days' notice of such sale by advertising in the "Hardin Tribune," a newspaper of general circulation, printed and published in the City of Hardin, in the State and District of Montana, the same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this Court, after deducting all proper charges and costs incurred herein to be allowed by this Court.

Done in open court this 13 day of March, 1922.

BOURQUIN.

Judge.

Filed March 13, 1922. C. R. Garlow, Clerk.

Thereafter, on April 7, 1922, bill of exceptions was duly allowed, signed and filed herein, being in the words and figures following, to wit: [24]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4 $\frac{1}{2}$ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire

on Right Rear Wheel, One 34 x 4½ Good-year Tire on Left Front Wheel, One 34 x 4½ Goodyear Tire on Left Rear Wheel, One 34 x 4½ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One Storage Battery, One Spotlight, One 34x4½ Innertube, One Set 34x4½ Chains, and A. J. STUPER,

Libelee,^s

and

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDOWELL MOTOR COMPANY,

Intervenor.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial on the 10th day of March, 1922, without a jury,—a jury having been waived by the written stipulation of the parties filed in said cause,—the Honorable GEORGE M. BOURQUIN, United States District Judge for Montana, presiding.

Whereupon the following proceedings were had and evidence introduced, to wit:

A stipulation was entered into between the parties, which, omitting title of court and cause, is as follows: [25]

"IT IS HEREBY STIPULATED AND AGREED by and between John L. Slattery, Esq., United States District Attorney for the District of Montana, for and on behalf of the United States of America in the above-entitled matter, and Messrs. Grimstad & Brown, for and on behalf of the claim of E. P. McDowell in the above-entitled matter, that the following facts are hereby admitted as true and are hereby submitted to the Court for judgment thereon:

I.

That A. J. Stuper did on the 31st day of January, 1921, near the City of Hardin, County of Big Horn, State and District of Montana, have possession of One Hudson Automobile, License No. 57695 Montana 1920, Engine No. 91473, Car No. 32512, together with the tools and accessories described in the information on file herein, and that at that time the said A. J. Stuper had a quantity of distilled spirits, to wit, whiskey, in said automobile, and that he was transporting, removing, and concerned in removing the same, by means of said Hudson Automobile, tools and accessories, as mentioned in said libel of information, without first obtaining a permit entitling him so to do, and paying the Internal Revenue tax due thereon; the said whiskey then and there so transported and removed being distilled spirits in respect whereof a tax then was imposed by law, to wit, the Internal Revenue tax imposed by law on distilled spirits, and then and there due and unpaid; that said Hudson Automobile and tools and accessories were taken by the plaintiff, by and

through its proper officers, and that they are now in the possession of plaintiff, its officers and agents.

II.

That at the time said automobile, tools and accessories, as mentioned in said libel of information, were taken into the possession of the United States of America that E. P. McDowell, the intervenor herein, had a valid and existing claim against [26] said automobile, tools and accessories in the sum of Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at the rate of ten per cent per annum from December 3, 1920, and that said claim of the said E. P. McDowell was represented by a conditional bill of sale, he having sold automobile, tools and accessories to the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time of the seizure thereof; that said conditional bill of sale was signed and executed by the said A. J. Stuper and was *bona fide* in all respects, and was placed on record in the office of the County Clerk and Recorder of Deeds for Yellowstone County, Montana, on the 7th day of December, 1920, which is the County where said E. P. McDowell is doing business and where said automobile, tools and accessories were sold; that said sale was in all respects fair and legal and was not made with any knowledge or information of any kind whatsoever on the part of said E. P. McDowell that the said A. J. Stuper intended to, or had any intention of any kind to use the same to transport distilled spirits in violation of the law of the United States of America.

III.

That said automobile, tools and accessories were taken from A. J. Stuper, at the time and manner mentioned in said libel of information, by John MacLeod, who was at that time sheriff of Big Horn County, Montana, and that he was not at that time, or at all, an officer of the United States of America, but at said time was acting in his capacity as a sheriff of Big Horn County, Montana.

IV.

That the whiskey so being removed and transported in said Hudson Automobile, at the time said Hudson Automobile, tools and accessories were seized, was Canadian whiskey, then and there and theretofore imported into the United States and [27] upon which the Internal Revenue tax therefor had not been paid.

V.

That after said automobile, tools and accessories were seized by the said sheriff of Big Horn County, Montana, it was at a subsequent date thereof duly turned over to the officers of the United States of America, together with the distilled spirits found in said automobile.

VI.

That the libel information as filed herein is prosecuted by reason of the violation of the Internal Revenue Laws of the United States of America, and not by reason of any violation of the National Prohibition Act, which is commonly known as the Volstead Act.

VII.

That the said A. J. Stuper, who was lawfully in possession of said automobile, tools and accessories at the time they were seized, has never been convicted of the crime of transporting and removing distilled spirits with intent to defraud the United States of America from any tax imposed by law thereon, or at all.

VIII.

That a true and correct copy of said conditional sales contract is attached to the answer of E. P. McDowell filed in said cause, and that said sum, to wit, Fourteen Hundred Eight Dollars (\$1408.00), together with interest thereon at ten per cent per annum from December 3, 1920, was due and owing the said E. P. McDowell from the said A. J. Stuper at the time said automobile, tools and accessories were taken from the said A. J. Stuper, as set forth in said libel of information, and that said sum and interest is now due the said E. P. McDowell, and has not been paid, and that the same would be a valid lien against said automobile, tools and accessories, if the same were sought to be forfeited under the laws of the State of Montana, and that the said [28] E. P. McDowell has no other means of collecting or enforcing said claim.

Signed and dated this 3rd day of March, 1922.

JOHN L. SLATTERY,

United States Attorney, District of Montana.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for E. P. McDowell, Intervenor."

That thereafter a motion was made on behalf of E. P. McDowell the intervenor, for a decision in his favor upon the ground that the libel of information was filed because of the violation of the Internal Revenue Law of 1866, and that the same has been repealed by the National Prohibition Act.

Said motion was overruled by the Court and exception noted. The Court thereupon found the issues in favor of the libelant and judgment and decree ordered accordingly.

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action, and that the recitals therein regarding the evidence are true and correct, and the same is now allowed, approved and signed and ordered filed and made a part of the records in said cause.

Dated this 7 day of April, 1922.

BOURQUIN,
Judge.

Comes now John L. Slattery, Esq., United States District Attorney, and says to the Court that he has no amendments or corrections to propose to the above and foregoing bill of exceptions, and hereby consents that the same may be settled and allowed immediately.

Signed and dated this —— day of March, 1922.

_____,
United States District Attorney. [29]

Due service of the within bill of exceptions and receipt of a copy of the same is acknowledged this 18th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Atty.,
Attorney for Pltf.

Filed April 7, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [30]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4½ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4½ Goodyear Tire on Right Rear Wheel, One 34 x 4½ Goodyear Tire on Left Front Wheel, One 34 x 4½ Goodyear Tire on Left Rear Wheel, One 34 x 4½ Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One

Storage Battery, One Spotlight, One 34 x 4½
Innertube, One Set 34 x 4½ Chains, and A.
J. STUPER,

Libelee,
and

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Intervenor.

Assignment of Errors.

The petitioner in error, in connection with his petition for a writ of error, makes the following assignments of errors, which he avers occurred upon the trial of the cause, to wit:

1. The lower court erred in overruling intervenor's motion for judgment and decree in his favor, for the reason that the libel of information failed to state facts sufficient to show that the said automobile, tools and accessories, as alleged in the information, had been used in violation of any laws of the United States of America.

2. The lower court erred in refusing to grant the intervenor's motion for judgment and decree in his favor, for the reason that the libel of information was prosecuted by reason [31] of the violation of the Internal Revenue Laws of the United States of America, and that said law or laws had been and were at the time of the trial of said cause repealed by what is known as the National Prohibition Act, otherwise commonly known as the Volstead Act.

3. The lower court erred in refusing to grant the motion of the intervenor for judgment and decision in his favor, for the reason that he had a valid and existing claim against said automobile, tools and accessories, and that he had no way of obtaining payment of said claim except by taking said automobile, tools and accessories.

4. The lower court erred in refusing to grant intervenor's motion for judgment and decision in his favor and in rendering judgment and decision in favor of the libelant, for the reason that the statute under which the libel proceeded has been repealed, and that the seizure and attempted forfeiture of the said automobile, tools and accessories was void, illegal and of no force and effect.

GRIMSTAD & BROWN,
By O. KING GRIMSTAD,
Attorneys for Intervenor.

Due service of the within Assignment of Errors and receipt of a copy of the same is acknowledged this 30th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Attorney,
Attorney for Pltf.

Filed March 30, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, citation was duly issued and filed herein, the original citation being hereto annexed and being as follows, to wit: [32]

In the United States Circuit Court of Appeals for the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDowell MOTOR COMPANY,

Plaintiff in Error,
vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, within thirty days from date hereof, to wit, the 30 day of Mar. 1922, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, where E. P. McDowell, doing business under the firm name and style of E. P. McDowell Motor Company, is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Judge of the United States District Court for the District of Montana this 30th day of March, 1922.

BOURQUIN,

Judge. [33]

Due service of the within Citation on Writ of Error and receipt of a copy of same is acknowledged this 30 day of Mch., 1922.

W. H. MEIGS,

Asst. U. S. Atty.,

Attorney for Libelant. [34]

[Endorsed]: No. 938. In the United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. United States of America, Defendant in Error, Citation on Writ of Error. Filed this 30th day of Mar., 1922. C. R. Garlow, Clerk of the District Court. By _____, Deputy.

Thereafter, to wit, on March 30, 1922, writ of error was duly issued herein, the original writ of error being hereto annexed and being as follows, to wit: [35]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States of America to
the Honorable Judge of the District Court of
the United States for the District of Montana:

Because in the record and of proceedings, as also
in the rendition of judgment between the United
States of America, as libelant, and E. P. McDowell,
doing business under the firm name and style of E.
P. McDowell Motor Company, as intervenor, a
manifest error hath happened to the great damage
of said intervenor, as by his complaint appears, and
we being willing that error, if any hath been done,
should be corrected, and full and speedy justice
done to the party aforesaid in this behalf do com-
mand you, if judgment be therein given, that under
your seal you send the record and proceedings
aforesaid, with all things concerning the same, to
the United States Circuit Court of Appeals for the
Ninth Circuit, together with this Writ, so that you

have the same at the City of San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in said Circuit Court of Appeals to [36] be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 30th day of March, 1922.

[Seal] C. R. GARLOW,
Clerk of the United States District Court for the
District of Montana.

Allowed this 30th day of March, 1922, after plaintiff in error had filed with this court with his petition for a writ of error, his assignment of errors.

BOURQUIN,
Judge. [37]

Due service of the within Writ of Error, and receipt of a copy of same is acknowledged this 30th day of March, 1922.

W. H. MEIGS,
Asst. U. S. Atty.,
Attorney for Libelant. [38]

[Endorsed]: No. 938. In the United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. United States of America,

Defendant in Error. Writ of Error. Filed this 30 day of March, 1922. C. R. Garlow, Clerk of District Court. By _____, Deputy.

That on March 30th, 1922, stipulation as to record, was duly filed herein, being as follows, to wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

E. P. McDOWELL, Doing Business Under the Firm Name and Style of E. P. McDowell
MOTOR COMPANY,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Stipulation as to Record.

IT IS HEREBY STIPULATED by and between counsel for the respective parties that the parts of the record necessary for consideration of the errors assigned and intended to be relied upon are as follows:

Libel of information and order; motion for leave to intervene and intervenor's petition; stipulation waiving trial by jury; decree; bill of exceptions; assignments of error; writ of error.

Dated this 30th day of March, 1922.

GRIMSTAD & BROWN,

By O. KING GRIMSTAD,

Attorneys for Plaintiffs in Error.

W. H. MEIGS,

Attorney for Defendant in Error.

Filed March 30, 1922. C. R. Garlow, Clerk.

That on March 30, 1922, a praecipe for record was duly filed herein in the words and figures following, to wit: [39]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE HUDSON AUTOMOBILE, and One 34 x 4 $\frac{1}{2}$ Goodrich Silvertown Cord Tire on Right Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Right Rear Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Front Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Left Rear Wheel, One 34 x 4 $\frac{1}{2}$ Goodyear Tire on Side of Car, One Bumper in Front, One Short Handle Shovel, One Full Set Side Curtains, One Auto Jack, One Tire Pump, One Demountable Rim Wrench, Three Small Monkey Wrenches, Three Hammers, Two Pairs Pliers, Four End Wrenches, One

Storage Battery, One Spotlight, One 34 x 4½
Innertube, One Set 34 x 4½ Chains, and A. J.
STUPER,

Libelee,
and

E. P. McDOWELL, Doing Business Under the Firm
Name and Style of E. P. McDOWELL
MOTOR COMPANY,

Intervenor.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them, under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause:

Libel of information and order; motion for leave to intervene and intervenor's petition; stipulation waiving jury; assignments of errors; writ of error; bill of exceptions; judgment and decree; praecipe for appellate record; clerk's certificate, and stipuation on printing of record.

GRIMSTAD & BROWN,
By O. KING GRIMSTAD,
Attorneys for Plaintiff in Error.

Filed March 30, 1922. C. R. Garlow, Clerk.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 40 pages, numbered consecutively from 1 to 40 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed (except stipulation waiving jury trial, as no such stipulation was filed in said cause), as appears from the original records and files of said court in my custody as such clerk.

And I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifteen and 80/100 Dollars (\$15.80), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 21st day of April, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk. [41]

[Endorsed]: No. 3865. United States Circuit Court of Appeals for the Ninth Circuit. E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 24, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. P. McDOWELL, doing business under the
firm name and style of E. P. McDOWELL
MOTOR COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GRIMSTAD & BROWN,
Billings, Montana,

CHARLES A. STRONG,
San Francisco, California,

Attorneys for Plaintiff in Error.

FILED

OCT 3 - 1922

F. D. MONCKTON,
CLERK

No. 3865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. P. McDOWELL, doing business under the
firm name and style of E. P. McDOWELL
MOTOR COMPANY,
vs.
Plaintiff in Error,

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

On the 31st day of January, 1921, plaintiff in error, hereinafter called the plaintiff, was the owner of a certain automobile, with its tools and accessories, which at the time were lawfully in possession of one A. J. Stuper under a valid contract of conditional sale.

Stuper was transporting in said automobile a quantity of whiskey, upon which the Internal Revenue Tax had not been paid. The sheriff of Big Horn County, Montana, seized said automobile and thereafter delivered it to the officers of the United

States of America, in whose possession it now is. Stuper was not convicted of the crime of transporting and removing distilled spirits, nor was he tried or convicted for transporting and removing the whiskey found in his automobile. Plaintiff had no knowledge that the automobile was being used to illegally transport liquor.

On the 31st day of August, 1921, the automobile was libelled by officers of the United States Government, and the plaintiff herein, through proper procedure, filed his motion to intervene, which was allowed. Thereafter a statement of facts was agreed to and signed by the interested parties, and the matter was submitted to the court for decision and thereafter a decree was made and entered condemning and forfeiting the automobile with its tools and accessories and directing that the same be sold at public auction (Transcript 25-26-27).

Thereafter, in due time, the bill of exceptions was duly filed, together with the assignment of errors.

Specifications of Error.

1. The court erred in overruling plaintiff in error's motion for judgment and decree in his favor, for the reason that the libel of information failed to state facts sufficient to show that the said automobile, tools and accessories, as alleged in the information, had been used in violation of any laws of the United States of America.

2. The court erred in refusing to grant plaintiff in error's motion for judgment and decree in his favor, for the reason that the libel of information was prosecuted by reason of the violation of the Internal Revenue laws of the United States of America and that said law or laws had been and were at the time of the trial of the said cause repealed by what is known as the National Prohibition Act, otherwise commonly known as the Volstead Act.

3. The court erred in refusing to grant the motion of plaintiff in error for judgment and decision in his favor, for the reason that he had a valid and existing claim against said automobile, tools and accessories and that he had no way of obtaining payment of said claim except by taking said automobile, tools and accessories.

4. The court erred in refusing to grant plaintiff in error's motion for judgment and decision in his favor and in rendering judgment and decision in favor of the libellant, for the reason that the statute under which the libel proceeded has been repealed, and the seizure and attempted forfeiture of the said automobile, tools and accessories was void, illegal and of no force and effect.

Arguments and Authorities.

In the agreed statement of facts (Transcript 21-22) it is expressly stipulated that the libel of

information as filed herein is prosecuted by reason of the violation of the Internal Revenue laws of the United States of America and not by reason of any violation of the National Prohibition Act. The portion of the Revenue laws under which the United States officers were acting is Section 3450 of the Revised Statutes which reads in part as follows:

“Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed * * * are removed * * * with intent to defraud the United States of such tax * * * all such goods and commodities * * * and vessel, boat, cart, carriage or any conveyance whatever * * * shall be forfeited.”

The question which presents itself here is whether or not the National Prohibition Act repealed Section 3450 insofar as that section authorized the confiscation of vehicles used in transporting liquor upon which the tax had not been paid. If the section was repealed in that regard then any proceedings looking toward condemnation would have to be brought under the National Prohibition Act and the lower court was without power to confiscate the automobile in possession of Stuper.

The stipulation to the effect that this proceeding is under Section 3450 of the Revised Statutes and not under the National Prohibition Act relieves us from concern as to whether or not the automobile could be confiscated under the National Prohibition Act. We are interested only in the question of whether or not Section 3450 was impliedly repealed by the enactment of the National Prohibition Act.

Section 35 of that Act contains the following,

“all provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency.”

The Supreme Court of the United States in the case of United States v. Yuginovich, (June 1, 1921), 256 U. S., page 450, 41 Sup. 551, decided that this provision of the Volstead Act must be construed in the light of the rule for construing Penal Statutes,

“that later enactments repeal former ones, particularly covering the same acts, but fixing a lesser penalty.”

Section 26 of the Volstead Act which authorizes the confiscation of vehicles used in the transportation of liquor visits a lesser penalty upon the owner of the vehicle than Section 3450 of the Revised Statutes. Under the latter section it makes no difference whether or not the owner of the vehicle is innocent. Even though his vehicle is used to transport liquor without his knowledge or consent it would be subject to confiscation. Under Section 26 of the Volstead Act the owner is permitted to show cause why the vehicle shall not be forfeited and there is a forfeiture to the extent only of the interests of those who were connected with the offense in some degree of responsibility, guilt, or negligence.

The question of whether or not the National Prohibition Act repealed Section 3450 of the Re-

vised Statutes has been before the District Courts of the United States a great many times within the last few months, but the decisions of those courts are in such hopeless conflict that no useful purpose will be served by analyzing them here. A large number of well-considered cases, as will appear from the list hereinafter set forth, hold that the effect of the enactment of the Volstead Act is to work a repeal of inconsistent provisions of the Revenue Acts.

The precise question here presented was before the Circuit Court of Appeals of the Fifth Circuit in the case of United States v. One Haynes Automobile, decided on July 25, 1921, and reported in 274 Fed. page 926. In that case a libel was brought to condemn an automobile under Section 3450 of the Revised Statutes, on the ground that it was at the time of seizure being used in the removal of liquor upon which the tax had not been paid. It was conceded that the libel did not allege facts sufficient to sustain it against demurrer as not stating a case for forfeiture under the Volstead Act although the acts complained of occurred since the Volstead Act took effect. In holding that the automobile could not be confiscated under Section 3450, Judge King said:

“It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under Section 26 of the Volstead Act, with its provisions for preserving the rights of third persons, and still leave them subject to be forfeited under the *more drastic provisions* of Revised Statutes, Sec. 3450.”

In *Lewis v. United States*, decided on April 14, 1922, by the Circuit Court of Appeals of the Sixth Circuit, and reported in 280 Federal, at page 5, the United States filed a libel against an automobile seeking to condemn it because it had been seized by the Collector of Internal Revenue while being used to transport whiskey upon which the tax had not been paid. The District Court entered its judgment of condemnation. The Circuit Court of Appeals reversed the District Court, saying in part:

“The argument in favor of the implied repeal rests upon the principles adopted by the Supreme Court in *U. S. v. Yuginovich*, 256 U. S. 450, 41 Sup. Ct. 551, 65 L. Ed.—, and the controlling consideration is whether there is such inconsistency between a forfeiture of this automobile, under these circumstances, pursuant to Section 3450 and that forfeiture which is provided for under Section 26 of the National Prohibition Act, as to indicate that Congress did not intend a forfeiture under either section which the prosecutor might select.

* * * * *

The act now charged against Lewis was the transportation in his automobile of intoxicating liquor upon which no tax had been paid under the internal revenue law. Concededly this liquor had been manufactured for and was being concealed and transported for beverage purposes. The primary act, the removing and concealing, was the same when involved under one statute as under the other. The punishment provides under Section 3450, as it has been construed (*Goldsmith v. U. S.*, 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed.—), was the confiscation of the automobile wholly without regard to the question whether the owner or lienholder was in any degree at fault; the pun-

ishment provided by the National Prohibition Act (Section 26) was a forfeiture of the machine to the extent only of the interests of those persons who were connected with the offense in some degree of responsibility, guilt or negligence.

* * * * *

We are not advised of any other supposed distinctions between the question now presented and that which has been decided by the Supreme Court, and our views concerning those which we have now considered make it necessary to hold that Section 3450 *is so far repealed that there cannot be a forfeiture thereunder* of the means used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes. However, this result would be sustained as well by the broader proposition that under the circumstances here existing, there could not have been the intent—necessary under Section 3450—to defraud the United States of the tax, and the validity of this broader proposition should be considered. The intent in that section specified is that to defraud of ‘such tax’, and this reference is to ‘any tax’ which ‘is or shall be imposed’ in respect of ‘any goods or commodities’. By the system existing when section 3450 was adopted, it was contemplated that a specified tax was levied by the law upon all distilled spirits and that this tax must be paid by attaching to the container advance paid revenue stamps, with which it was the duty of every manufacturer to provide himself. This whole system, the automatic imposition of the tax and the advance of simultaneous payment therefor, was abolished by the new law. Stamps were expressly forbidden and—so far as we observe—no other method of payment was provided if the liquor was for beverage purposes.

“It is not easy to see how a duty to pay a tax can arise, if there is no way in which it

can be paid and no officer authorized to receive it; nor how, *lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying*, or by acts which would be in aid of an intent not to pay. The only tax which now is ever imposed against such liquor, and is also made payable, is that double tax which the collector specifically assesses in any case where evidence of an unlawful manufacture comes to his notice. The very provision that he shall assess a double tax may be said to imply that one-half of it is in place of that original tax which would have accrued under the old law, but which never had accrued under the new, and which therefore must be specifically levied. Of course, after such assessment, there could be an intent to defraud the United States out of such tax; but that case is not before us. Without doubt the power to tax illicit liquor, in spite of the absolute prohibition against manufacture, continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods of payment and the substitution of no other method."

The question of whether or not an automobile could be confiscated and libelled under the Internal Revenue laws was not raised in the case of *United States v. Two Thousand Cases of Whiskey, et al,* (Circuit Court of Appeals, Second Circuit), 277 Fed. Rep. 410, but the question of whether or not the National Prohibition Act repealed Revised Statutes 3453, providing for the seizure and forfeiture of goods, merchandise, etc., found in any person's possession or control, for the purpose of being sold or removed in fraud of the Internal Revenue laws,

was raised in that case and the court held that the National Prohibition Act repealed that section.

The reasoning in that case, we believe, should be applied to the facts in this case, the court saying: "We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes; but 'being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes,' it has erected its own machinery to accomplish the desired result."

The following cases hold that the National Prohibition Act has in some form or other repealed certain provisions of what is commonly known as the Internal Revenue Laws of 1866:

- U. S. v. Windham (District Court) 264 Fed. Rep. 376;
- U. S. v. Yuginni, et al (District Court) 266 Fed. Rep. 746;
- U. S. v. Stafoff (District Court) 268 Fed. Rep. 417;
- U. S. v. Puhac (District Court) 268 Fed. Rep. 392;
- Reed v. Thurmond (Circuit Court of Appeals, 4th Circuit) 269 Fed. Rep. 252;
- Ketchum v. U. S. (Circuit Court of Appeals, 8th Circuit) 270 Fed. Rep. 416;
- Ravity v. Hamilton (District Court) 272 Fed. Rep. 721;
- U. S. v. Dowling (District Court) 278 Fed. Rep. 630;
- U. S. v. Yuginovich, 41 Sup Ct. Rep. 551,

We also desire to call the court's attention to the case of Farley v. United States, 269 Fed. 721, decided by this Honorable court on February 7, 1921, in which the court used the following language:

"As we have seen, the Prohibition Act, by the third section of title 2, inhibits in the most comprehensive terms possible the manufacture of or traffic in intoxicating liquors except as authorized by the act, and an infraction of its mandate in this respect is rendered criminal by Section 29. So that here we find the entire subject-matter of criminal liability for such manufacture or traffic in intoxicants covered by the later statute, and with different penalties subjoined from those obtaining under the old statutes.

* * * * *

"We are of the opinion that the statute under which the indictment in the present case is preferred was repealed by implication by the Prohibition Act. As applicable to the present act, this view is sustained by two cases in the District Courts, United States v. Yuginni, et al, 266 Fed. 746, and United States v. Windham, 264 Fed. 376."

From the foregoing it is clear that the concensus of opinion of the Circuit Courts of Appeals is that the provision in Section 3450 for forfeiture of vehicles used to transport liquor upon which the tax has not been paid has been repealed by the National Prohibition Act and we therefore urge that the judgment of the lower court be reversed.

Dated, October 4, 1922.

Respectfully submitted,

GRIMSTAD & BROWN,

CHARLES A. STRONG,

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

E. P. McDOWELL, Doing Business Under
the Firm Name and Style of E. P. Mc-
DOWELL MOTOR COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN L. SLATTERY,
United States Attorney,

RONALD HIGGINS,
Assistant United States Attorney,

W. H. MEIGS,
Assistant United States Attorney,

Attorneys for Defendant in Error.

No. 3865.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

E. P. McDOWELL, Doing Business Under
the Firm Name and Style of E. P. Mc-
DOWELL MOTOR COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

There is no dispute as to the facts involved in this case, as they were agreed upon (Tr., 19-22). From the agreed statement it appears that on January 31, 1921, in the State and District of Montana, the automobile involved herein was being used by one Stuper in

the transportation and removal of a quantity of distilled spirits, to wit, Canadian whiskey, imported into the United States, and upon which whiskey the Internal Revenue tax, then imposed by law, had not been paid and was then due, and that no permit had been issued entitling Stuper to so transport such whiskey.

McDowell's interest is that of a vendor who reserved title to the car until final payment had been made by Stuper, and that such final payment had not been made.

ARGUMENT AND AUTHORITIES.

Though four errors are assigned, but one is urged, and the sole question before this court is whether or not Section 3450 of the Revised Statutes of the United States has been repealed by implication by the passage of the National Prohibition Act. This identical question has been passed upon by numerous Federal District Courts and certain Circuit Courts of Appeal. One line of decisions holds in favor of such repeal, while the other rejects such construction. In a number of cases decided by Judge Bourquin in the District Court for Montana, he has consistently held against such repeal, and the reasoning and argument advanced by him in such decisions appear to be more sound and more consistent with the apparent intention of Congress in enacting the National Prohibition Act than the reasoning and arguments in the cases which adhere to the opposite view.

No useful purpose would be here served by quoting from the decisions of Judge Bourquin or from the de-

cisions of other courts in harmony with his views, as the number of cases on both sides of the question is limited and it will be assumed that this court would prefer to read such cases rather than excerpts from them.

The following are cited as best illustrating the cogent reasons why the contention for the implied repeal of Section 3450 supra, is unsound:

- U. S. vs. One Cole Auto (D. C. Mont.), 273 Fed., 934;
- U. S. vs. One Buick Roadster, et al (D. C. Mont.), 280 Fed., 517;
- Reo Atlanta Co. vs. Stern (C. D. Ga.), 279 Fed., 422;
- Payne vs. U. S. (5th C. C. A.), 279 Fed., 112;
- Tuscan (D. C. Ala.), 276 Fed., p. 55;
- U. S. vs. One Essex Touring Auto (D. C. Ga.), 276 Fed., 28;
- U. S. vs. One Haynes Auto (D. C. Fla.), 268 Fed., 1003.

The rule that repeals by implication are not favored is axiomatic and does not require citation of authorities.

From the agreed statement of facts herein, the conclusion inevitably flows that Stuper was using the automobile for the purpose of removing and transporting the untaxed-paid whiskey in violation of Section 3450 supra, namely, "with intent to defraud the United States" of the taxes then due on the whiskey. The National Prohibition Act does not provide a penalty

for an act done with intent to defraud the United States of any tax imposed upon whiskey. In fact, Section 35 of the National Prohibition Act specifically provides that the act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in intoxicating liquor. It may well be said, then, that the National Prohibition Act is not only not inconsistent with Section 3450 supra, but that by Section 35 above referred to, it clearly recognizes its existence and declares for its future operation.

It is submitted that Section 3450 supra has not been repealed by the National Prohibition Act, and that the facts in this case, as agreed upon, bring it squarely within the provisions of said section, and that the judgment of forfeiture in favor of the government is correct and should not be disturbed.

Respectfully submitted,

JOHN L. SLATTERY,
United States Attorney,

RONALD HIGGINS,
Assistant United States Attorney,

W. H. MEIGS,
Assistant United States Attorney,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY MABRY,

Appellant,

vs.

GEORGE D. BEAUMONT, as United States Marshal, for the Territory of Alaska, First Division,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

FILED

AUG 10 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY MABRY,

Appellant,

vs.

GEORGE D. BEAUMONT, as United States Marshal, for the Territory of Alaska, First Division,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

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Names and Addresses of Attorneys of Record.

WICKERSHAM & KEHOE, Juneau, Alaska,
Attorneys for Appellant.

ARTHUR G. SHOUP, U. S. Attorney, Juneau,
Alaska, Attorney for Appellee.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2169—A

HARRY MABRY,
Plaintiff,
vs.

GEORGE D. BEAUMONT, United States Marshal,
Defendant.

Petition for Writ of Habeas Corpus.

To Honorable THOMAS M. REED, Judge of the
District Court of the Territory of Alaska,
First Division.

Comes now your petitioner, Harry Mabry, and
presents this his petition, and for cause of action
against the defendant says:

I.

That your petitioner, Harry Mabry, is imprisoned
and restrained in his liberty, at the Federal Jail in
the City of Juneau, Alaska, and within the juris-
diction of this court, by George D. Beaumont, the
United States Marshal for the Territory of Alaska,
First Division, having charge thereof.

That your petitioner is not properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree; that he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or Judge of the United States, in a case where such courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by [1*] virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except as herein set forth.

II.

That petitioner is not imprisoned or restrained by virtue of any order, judgment or process specified in section 1399, Compiled Laws of Alaska, 1913.

III.

That the cause and pretense of such imprisonment or restraint, according to the best knowledge or belief of the petitioner, is that plaintiff was complained against by H. D. Stabler, Special Assistant United States Attorney, before R. W. DeArmond, Commissioner and *Ex-officio* Justice of the Peace

*Page-number appearing at foot of page of original certified Transcript of Record.

in and for Sitka Precinct, in the Territory of Alaska, First Division, for an alleged violation of the Alaska Bone Dry Act, Pub. No. 308, by charging this plaintiff therein with possessing intoxicating liquor in said precinct on December 1st, 1921. That said complaint, a full, true and correct copy of which is hereto attached and made a part of this petition as fully as if repeated herein, was filed with the said Commissioner at Sitka, Alaska, on January 9th, 1922. That upon receiving and filing said complaint the said Justice of the Peace issued, under his hand and seal, a warrant based wholly upon the charge therein, for the arrest of this petitioner, and delivered said warrant to the Deputy United States Marshal at Sitka, Alaska, and the said Deputy Marshal, on the 9th day of January, 1922, at Sitka, Alaska, took this petitioner into custody and brought him before the said DeArmond, as such Commissioner and Justice of the Peace at his office in Sitka, Alaska, on said day. That a full, true and correct copy of said warrant is hereto attached and made a part of this petition.

That said DeArmond, aforesaid, thereupon issued under [2] his hand and seal an order for the empanelling of a jury to try this petitioner upon the charges so contained in the said complaint and warrant, and placed said order in the hands of said Deputy United States Marshal for service. Whereupon the said Deputy Marshal summoned twelve persons who appeared in said court for such purpose, and said Deputy Marshal thereupon made return to said court of such service; that a full, true

and correct copy of said order for jury and the return of said Deputy Marshal's acts thereunder are attached to this petition and made a part thereof.

That thereupon the said DeArmond, as aforesaid, issued under his hand and seal a subpoena commanding five certain persons named therein to appear before the Commissioner's Court of the United States for the District of Alaska, First Division, Sitka Precinct, immediately to testify as witnesses against this petitioner as defendant in that action; and the said Deputy Marshal did so subpoena said persons, who did appear before said court at the time and place mentioned in said subpoena and did testify in said action in said court; that a full, true and correct copy of the said subpoena and the return thereon are attached to this petition as a part thereof.

That this petitioner appeared before said court under the compulsory power of said warrant and in charge of said Deputy Marshal, and being asked if he was guilty or not guilty of the matters charged in the said complaint, answered that he was not guilty; whereupon the said court empanelled the said twelve persons into a jury and proceeded to try the said issue so charged against this petitioner in said complaint. The five witnesses mentioned were called and testified in support of the allegations of said complaint and this petitioner did not introduce any evidence. Thereupon the said twelve persons acting as a jury returned into said court a verdict signed by each of said twelve persons, a

full, true and correct copy of which is attached to this petition and made a part thereof. [3]

Thereupon the said Commissioner and *Ex-officio* Justice of the Peace, R. W. DeArmond, as such officer, on January 9th, 1922, made and entered a false and pretended judgment in said cause, without authority or jurisdiction to do so in law, a full, true and correct copy of which said false and pretended judgment is attached to this petition and verified and made a part hereof as fully as if so copied herein at this place; and that said Court at the time and place did make another false and pretended judgment in said cause by writing the same into and as a part of his docket entries in said cause, without authority or jurisdiction so to do, in law or at all, a full, true and correct copy of which said second judgment is included in the copy of the docket entries so made by said DeArmond, as such officer, on said January 9th, 1922, in said cause, and which said full, true and correct copy of said second judgment so entered without authority or jurisdiction in law so to do is attached to this petition and made a part hereof as fully as if copied herein at this place.

Whereupon the said Deputy Marshal at Sitka, Alaska, on said January 9th, 1922, acting under said two false and pretended judgments, and not otherwise, took this petitioner into his custody, and thereupon forcibly and in violation of this petitioner's rights under the Constitution of the United States, and in violation of the laws thereof in force in Alaska, restrained and

imprisoned this petitioner first in the jail at Sitka, Alaska, under charge of the said United States Marshal, defendant herein, from whence he was by the said defendant and his official deputies forcibly removed from said jail at Sitka, to the town of Juneau, Alaska, in custody of the said Marshal, defendant, restrained of his liberty, and confined as a prisoner in the federal jail at Juneau, Alaska, under charge of the United States Marshal, defendant herein, under the pretended authority of the said two false and illegal judgments so rendered without jurisdiction or authority of law, by said DeArmond as such [4] Commissioner and Justice of the Peace.

That while so illegally confined in violation of law in said jail, by the said defendant, and for the purpose of procuring petitioner's liberty, this petitioner gave notice of appeal from the pretended and false judgments of the said Justice Court so pretending to find him guilty of the crime charged in said judgments, to the District Court of the Territory of Alaska, First Division, holding terms at Juneau, Alaska, which notice was served and filed in said justice court at Sitka, Alaska, on the 14th day of January, 1922, and petitioner at the same time and place also made, signed and filed a bond on appeal and for stay of proceedings and for the payment of the costs thereof, a full, true and correct copy of which notice of appeal and bond are attached to this petition and verified herewith and made part hereof as fully as if copied in full at this place in this petition. That said

notice of appeal and bond were filed in said cause by said DeArmond, on the 14th day of January, 1922, and approved, and thereupon of that day the said DeArmond, as such Commissioner and *Ex-officio* Justice of the Peace, in said precinct, made, signed and entered in the record of the proceedings in said cause and order reciting that said petitioner (defendant in that case) having appealed from said judgment and given sufficient bail to abide and perform the judgment of the appellee court, and commanding the United States Marshal, the defendant herein, to discharge this petitioner from custody, which the said Marshal did upon said order; that a full, true and correct copy of said order of discharge is hereto attached and made a part hereof as fully as if copied herein at this point.

That the said R. W. DeArmond, as such Commissioner and *Ex-officio* Justice of the Peace in and for said Sitka Precinct, aforesaid, in the trial of said cause made, kept and signed minutes of the proceedings in the said trial in his official docket, and hereto attached is a full, true and correct copy of all docket [5] entries made by said officer on the trial of this petitioner in said Commissioner's Court, which said entries are hereby made a part of this petition as fully as if copied herein.

That on the 8th day of March, 1922, the United States Attorney filed in the District Court in this Division, in this cause, there on said appeal, a motion to dismiss the appeal theretofore allowed by the said Commissioner and *Ex-officio* Justice of

the Peace, from his said false and pretended judgment of conviction against this petitioner in said cause, and served a copy of said motion to dismiss and a notice of hearing thereon upon the attorneys of record for this petitioner, for a hearing of said motion before this District Court at Juneau, Alaska, on the 11th day of March, 1922; that a full, true and correct copy of the said motion and notice are attached hereto and made a part of this petition.

That thereafter and on the 14th day of March, 1922, this petitioner, by his attorneys of record, filed in this court and cause, a motion for permission to file, and with it filed, an undertaking on appeal for the payment of all costs and disbursements that may be awarded against the defendant, this petitioner, on the appeal of the said cause from the said Commissioner's Court to the District Court, with sufficient sureties, a full, true and correct copy of which said bond and motion are attached to this petition and made a part thereof.

That on the 16th day of March, 1922, the Judge of this court made an order denying this petitioner permission to file the bond last named, to which petitioner excepted and exception allowed, a full, true and correct copy of said order is hereto attached and made a part of this petition.

That thereafter and on the 16th day of March, 1922, the Judge of the District Court of the Territory of Alaska, Division Number One, before whom the proceedings in the said case against this petitioner were then pending, made, signed and caused

the same [6] to be entered of record, an order dismissing the appeal of this petitioner (defendant) from the false and pretended judgments of conviction so made and entered against the defendant (this petitioner) by the said Commissioner and *Ex-officio* Justice of the Peace, in the said cause in the Sitka Precinct, as aforesaid, a full, true and correct copy of which order of dismissal is hereto attached and made a part of this petition as fully as if written herein.

That thereafter and on the 16th day of March, 1922, the Judge of this court made, signed and entered of record in this court, an order that a bench warrant issue out of this court directing the United States Marshal, defendant in this petition, to take this defendant into his custody; that a full, true and correct copy of said order for bench warrant is hereto attached and made a part of this petition.

Thereafter and on the 24th day of March, 1922, the said United States Marshal, George D. Beaumont, defendant herein, took this petitioner into his custody and ever since then has had and now restrains and confines petitioner in the jail belonging to the United States at Juneau, Alaska, under a pretended authority to so confine, restrain and imprison this petitioner under and in compliance with the said false and pretended judgment so claimed to have been made and entered in said Commissioner's Court by said R. W. DeArmond, *Ex-Officio* Justice of the Peace in and for Sitka Precinct, Alaska, on said 9th day of January, 1922, as herein above al-

leged; and upon no other authority except as hereinabove set out and alleged.

IV.

That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit: That the said R. W. DeArmond, Commissioner and *Ex-officio* Justice of the Peace in said Sitka Precinct, Alaska, aforesaid, had no jurisdiction or authority in law or otherwise, to render and make the pretended judgment so by him made and rendered [7] in said case against the defendant (petitioner) on said January 9th, 1922, as aforesaid, because the said judgment is not based upon any crime defined by or known to the laws of the United States or the Territory of Alaska, and the pretended crime stated therein is not a crime known to or defined by said law or any law. (2) Because said pretended judgment of January 9th, 1922, as aforesaid, being void for want of jurisdiction, and being so made in excess and outside of the jurisdiction of said Justice Court, as aforesaid, all subsequent proceedings of said Justice Court, and of the District Court, based thereon, were each without jurisdiction and wholly void. (3) Because the said pretended judgment of January 9th, 1922, as aforesaid, being void for want of and in excess of the jurisdiction of said Justice Court, all subsequent proceedings *proceedings* thereunder, both in said Justice Court and in this District Court, and the imprisonment and restraint of this defendant (petitioner) were and now are in violation of law and of this petitioner's

rights under the Fifth Amendment to the Constitution of the United States. (4) Because the complaint in said case against this defendant (petitioner) made and verified on said 9th day of January, 1922, by H. D. Stabler, Special Assistant United States Attorney, was so made in violation of the provisions of Section 28 and other provisions of the Act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the territory of Alaska, and for other purposes," approved February 14th, 1917, 39 Stat. L., page 903, and was made without authority of law and in violation of said law and did not state facts sufficient to constitute a crime, or to give the said Justice Court jurisdiction to try and sentence this petitioner as in said record stated. (5) That the pretended warrant so issued by the said Commissioner and *Ex-officio* Justice of the Peace in the Sitka Precinct, as aforesaid, on said January 9th, 1922, for the arrest of this petitioner (defendant) and upon which he was so arrested and restrained of his liberty, and so attempted to be [8] brought within the jurisdiction of the said Justice Court, was and is void and illegal in this: that it is in direct violation of Section 2384, Compiled Laws of Alaska, 1913, because it did not and does not now state or designate any crime therein alleged to have been committed by this petitioner, and because the said Deputy Marshal had no authority thereby to arrest or detain or imprison this petitioner (defendant) and his said arrest and imprisonment thereunder and his detention in said court were illegal because

said warrant was void and in violation of law. (6) That the pretended verdict rendered by the jury against this defendant (petitioner) in said Justice Court was and is null and void because it does not find the defendant guilty of any crime, and the same did not afford any jurisdiction to the pretended judgment and sentence so entered by the said justice of the peace thereon. (7) Because the pretended judgment so entered by the said Justice of the Peace in the case against this defendant (petitioner) as aforesaid, was null and void for the further reason that it provided that this petitioner (defendant) should be imprisoned in the jail at Sitka until the costs of said case were paid; and that part of the said pretended judgment providing for his said imprisonment for costs has been imposed upon this petitioner (defendant) and said judgment is wholly null and void for that reason also. (8) Because the docket entries in the case against the petitioner (defendant) kept by the said Justice and made a part of this petition show that the pretended crime charged against this petitioner (defendant) and upon which the jury so returned said verdict, and the Justice so rendered said pretended judgment and sentence, was not a crime, and that the said court had no jurisdiction to render any judgment and sentence against this petitioner (defendant) thereon or at all. (9) Because it appears on the face of the pretended judgment aforesaid, entered by the Justice in said Justice Court on January 9th, 1922, against petitioner [9] (defendant) that said Justice had no jurisdiction

or authority to sentence petitioner (defendant) to be imprisoned in jail four months, and an additional 300 days, as therein stated, because said periods exceed the jurisdiction of said Justice of the Peace to impose imprisonment, and said sentence was null and void. (10) Because it appears on the face of the order of the District Court in this case dismissing defendant's (petitioner's) appeal from the said Justice Court to the said District Court, as herein described, was without authority of law, and the affirmance of the said pretended judgment of the said Justice of the Peace of January 9th, 1922, as aforesaid, was without jurisdiction and void, and all proceedings and orders entered in said cause in said District Court, as aforesaid, were null and void and without jurisdiction. (11) That the order of said District Court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this petitioner (defendant) was in excess of the jurisdiction of the said District Court and its Judge, and null and void, and the arrest and imprisonment of this petitioner (defendant) being made and done under that warrant, was so done without the jurisdiction and is null and void. (12) That the present imprisonment of this petitioner under said pretended judgment of January 9th, 1922, and the said pretended bench warrant so issued by said District Court upon which this petitioner was so arrested on March 24th, 1922, and is now imprisoned, was and is illegal and without jurisdiction or authority of law, and the said United States Marshal, defendant

herein, is wholly without authority of law in restraining this petitioner and imprisoning him as aforesaid.

V.

That the legality of the imprisonment or restraint of this petitioner has not been already adjudged upon a prior writ of *habeas corpus*, by this or any other court, or at all.

WHEREFORE your petitioner prays that a WRIT OF HABEAS CORPUS [10] may be granted and issued out of this court, directed to the said George D. Beaumont, United States Marshal, as aforesaid, commanding him to bring and have the body of your petitioner before your Honor at the time and place therein specified, to do and receive what shall then and there be commanded by your Honor concerning the said petitioner together with the time and cause of the detention of your petitioner, together with said writ; and that upon said hearing this petitioner be restored to his liberty.

HARRY MABRY,
Petitioner.

Territory of Alaska,
Juneau Precinct,—ss.

Harry Mabry, being first duly sworn, deposes and says: That he is the petitioner mentioned in the foregoing petition; that he has heard the petition read, knows the contents thereof and believes the statements of facts therein to be true.

HARRY MABRY,
Petitioner.

Subscribed and sworn to before me this 25th day
of March, 1922.

[Notarial Seal]

J. W. KEHOE,

Notary Public for Alaska.

My commission expires Sept. 15, 1925.

WICKERSHAM & KEHOE,

Attorneys for Petitioner. [11]

Filed in the District Court, District of Alaska,
First Division. Jan. 18, 1922. John H. Dunn,
Clerk. By L. E. Spray, Deputy.

[Caption and Title.]

**Complaint for Violation of the Alaska Bone Dry
Act—Pub. No. 308.**

Harry Mabry is accused by H. D. Stabler in this
complaint of the crime of POSSESSING INTOXI-
CATING LIQUOR, committed as follows, to wit:
The said Harry Mabry in the District of Alaska,
and within the jurisdiction of this court, did wil-
fully and unlawfully, on the 1st day of December,
1921, at Sitka, Alaska, and in S. S. Thornton's resi-
dence near the Russian Greek Church at Sitka,
Alaska, then and there have in his possession intox-
icating liquor, to wit, moonshine whiskey, contrary
to the form of the statute in such cases made and
provided, and against the peace and dignity of the
United States of America.

H. D. STABLER,
Asst. U. S. Attorney.

United States of America,
Territory of Alaska,—ss.

I, H. D. Stabler, being first duly sworn, depose
and say that the foregoing complaint is true.

H. D. STABLER.

Subscribed and sworn to before me this 9th day
of January, 1922.

[Seal]

R. W. DeARMOND,

Ex-officio Justice of the Peace. [12]

In the Court of the United States Commissioner
and *Ex-officio* Justice of the Peace for the
Sitka Precinct, District of Alaska.

Bench-Warrant.

In the Name of the United States of America, to
the United States Marshal of the District of
Alaska, or any Deputy, GREETING:

Information upon oath having been this day
laid before me that the crime of violating the
Alaska Bone Dry Act, Pub. No. 308, has been com-
mitted, and accusing Harry Mabry thereof;

YOU ARE, THEREFORE, HEREBY COM-
MANDED forthwith to arrest the above-named
Harry Mabry and bring him before me at Sitka, or,
in case of my absence or inability to act, before the
nearest or most accessible magistrate.

Dated at Sitka, Alaska, this 9th day of January, 1922.

[Seal] R. W. DeARMOND,
United States Commissioner and *Ex-officio* Justice
of the Peace.

(RETURN ON ABOVE WARRANT.)

United States of America,
District of Alaska,
Division No. 1,—ss.

I hereby certify that I received the within warrant at Sitka, Alaska, on the 9th day of January, 1922, and that I served the same at Sitka, Alaska, on the 9th day of January, 1922, by taking the within named Harry Mabry into custody, and now produce him in court this 9th day of January, 1922.

G. D. BEAUMONT,
U. S. Marshal.

By S. G. Thomas,
Deputy. [13]

[Caption and Title.]

Order for Jury.

In the Name of the United States of America, to
the United States Marshal for the First Di-
vision, Territory of Alaska, or Any Deputy,
GREETING:

WHEREAS there has been a complaint duly
sworn to, filed in the above-entitled court, and the
above-named defendant having been brought be-
fore the above-entitled court to answer said com-

plaint, and the said complaint having been read and explained to him, and said person having entered a plea of "Not Guilty" and further requested that he be tried by a jury.

YOU ARE THEREFORE, HEREBY COMMANDED to summon twelve men with the necessary qualifications to appear at the courtroom of the above-entitled court at the hour of 11 A. M. Monday, the 9th day of January, 1922, to act as a jury in said cause.

[Seal] R. W. DeARMOND,
United States Commissioner and *Ex-officio* Justice
of the Peace.

(RETURN ON JURY ORDER.)

I hereby certify that I received the within Jury Order at Sitka, Alaska, on the 9th day of January, 1922, and that I served the same on the 9th day of January, 1922, at Sitka, Alaska, by summoning the following to act as jurors in said above-entitled case: E. W. Merrill, D. R. Jannings, Felix Beauchamp, Sam Butts, C. Jay Mills, John Sarvela, P. Threischield, C. C. Georgeson, Donald McGraw, John Gamble, Henry Woodruff, R. A. Buchanan.

Dated Jany. 9th, 1922.

GEO. D BEAUMONT,
U. S. Marshal.

By S. G. Thomas,
Deputy. [14]

Justice Court for the Sitka Precinct, Territory of Alaska, Division Number One.

United States of America,
Territory of Alaska,—ss.

Subpoena.

To Mrs. Elizabeth Hoolywood, Mrs. Bessie Coates,
Mrs. S. S. Thornton, Mr. S. S. Thornton and
Geo. B. Rice, GREETING:

YOU ARE HEREBY COMMANDED to appear before the Commissioner's Court of the United States for the District of Alaska, First Division, Sitka, Precinct, at the Commissioner's Office at Sitka in said Division on Monday the 9th day of January, 1922, immediately at —— o'clock — M. of that day to testify as a witness on behalf of the plaintiff in the case of United States vs. Harry Mabry, AND HEREOF FAIL NOT.

WITNESS my hand and seal of this court at Sitka, in said District and Precinct this 9th day of January, 1922.

[Seal] R. W. DeARMOND,
United States Commissioner and *Ex-officio* Justice
of the Peace.

(RETURN ON SUBPOENA.)

United States of America,
Territory of Alaska,—ss.

I HEREBY CERTIFY that I received the within Subpoena on the 9th day of January, 1922, at Sitka, Alaska, by reading and showing the original and delivering a ticket containing the substance thereof

to each of the within named witnesses, Mrs. Elizabeth Hollywood, Mrs. Bessie Coates, Mr. S. S. Thornton, Mrs. S. S. Thornton personally.

Dated at Sitka, Alaska, Jany. 9th, 1922.

S. G. THOMAS,
Deputy U. S. Marshal. [15]

[Caption and Title.]

Jury Verdict.

We, the undersigned jurors in the above-named matter, being duly subpoenaed and empanelled, and after hearing the evidence presented and giving sincere consideration to the same, find the defendant Harry Mabry GUILTY.

E. W. MERRILL.
R. A. BUCHANAN.
D. R. JENNINGS.
D. R. McGRAW.
C. C. GEORGESON.
C. JAY MILLS.
JOHN E. GAMBLE.
JOHN N. SARVELA.
P. TREISCHIELD.
H. M. WOODRUFF.
F. BEAUCHAMP.
SAM BUTTS. [16]

[Caption and Title.]

Violation of Alaska Bone Dry Law or Pub. No. 308.

Judgment.

On the 9th day of January, 1922, the above-named Harry Mabry having been brought before me, R. W. DeArmond, a U. S. Commissioner and *Ex-officio* Justice of the Peace at Sitka, Alaska, in a criminal action for the crime of violating the Alaska Bone Dry Law and the said Harry Mabry having pleaded not guilty and been duly tried by jury trial and upon such trial Harry Mabry having been duly convicted, I have adjudged that he be imprisoned in the jail at Sitka for four months and that he pay the costs of the action taxed at Ninety-three and 55/100 Dollars, and that he pay a fine of Six Hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding Three Hundred days.

A TRUE COPY OF THE ORIGINAL ENTRY
OF JUDGMENT.

IN WITNESS WHEREOF I have set my hand
at Sitka, Alaska, this 9th day of January, 1922.

[Seal]

R. W. DeARMOND,

U. S. Commissioner and *Ex-officio*
Justice of the Peace.

[Endorsed]: United States of America, District
of Alaska,—ss. I certify that I received the within
committment on the 9th day of January, 1922, and
executed the same on the 9th day of January, 1922,

by delivering the within named defendant to the jailer of the U. S. Jail, at Sitka, Alaska.

GEO. D. BEAUMONT,
U. S. Marshal.

By S. G. Thomas,
Deputy U. S. Marshal. [17]

[Caption and Title.]

Notice of Appeal.

To the United States Attorney for the First Division, Territory of Alaska:

You will please take notice, that the defendant in the above-entitled action appeals to the District Court, 1st Div. Territory of Alaska, from the judgment of the above-entitled court rendered on the 9th day of January, 1922, wherein the said defendant was convicted of a violation of the Alaska Bone Dry Law, to wit, the possession of intoxicating liquor in violation of the said law, and was convicted and sentenced by the above court to pay a fine of \$600.00 and to serve three months confinement in the jail at Juneau, Alaska.

JAMES WICKERSHAM,

J. W. KEHOE,

Attorney for Defendant.

Service of a true, full and correct copy of the within notice of appeal is hereby acknowledged this 11th day of January, 1922.

A. G. SHOUP,
United States Attorney. [18]

[Caption and Title.]

Bail on Appeal.

A judgment of the above-entitled court having been given on the 9th day of January, 1922, whereby Harry Mabry, the defendant herein, was condemned to pay a fine of \$600.00 and to serve three months in the jail at Juneau, Alaska, and he having appealed from the said judgment and been duly admitted to bail in the sum of Twelve Hundred Dollars.

We, W. P. Mills and A. Murray, both of Sitka, Alaska, hereby undertake that the above-named Harry Mabry shall in all respects abide by and perform the orders and judgments of the Appellate Court upon the appeal, or if he shall fail so to do in any particular, that we will pay to the United States the sum of Twelve Hundred Dollars.

W. P. MILLS.

A. MURRAY.

United States of America,
Territory of Alaska,
Sitka Precinct,—ss.

We, W. P. Mills and A. Murray, being first duly sworn each for himself and not one for the other, deposes and says:

That I am a citizen of the United States of America; that I am over the age of 21 years; that I am not a counsellor or attorney, marshal, clerk of any court or other officer of any court; that I am worth the sum specified in the within Bond on

Appeal, exclusive of property exempt from execution and over and above all just debts and liabilities.

W. P. MILLS.

A. MURRAY.

Taken and acknowledged before me this 14 day of January, 1922.

[Seal]

R. W. DeARMOND,
Justice of the Peace.

Approved this 14 day of January, 1922.

[Seal]

R. W. DeARMOND,
U. S. Commissioner *Ex-officio* Justice
of the Peace. [19]

In the United States Commissioner's *Ex-officio* Justice Court, Sitka Precinct, Judicial Division Number One, Territory of Alaska.

To the United States Marshal, First Judicial Division, Territory of Alaska.

Order Releasing Defendant from Custody.

Harry Mabry, who is detained by you in execution of a judgment whereby he is condemned to serve an imprisonment in the Juneau Jail for a period of four months and that he pay the costs of this action taxed at Ninety-three and 55/100 (\$93.55) Dollars, and that he pay a fine of Six Hundred (\$600.00) Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding three hundred days, having appealed

from said judgment and given sufficient bail to abide and perform the judgment of the Appellee Court, you are commanded forthwith to discharge him from your custody.

January 14th, 1922.

[Seal]

R. W. DeARMOND,

United States Commissioner *Ex-officio*
Justice of the Peace, Sitka Precinct,
Territory of Alaska. [20]

[Caption and Title.]

Docket Entries.

Complaint made by H. D. Stabler, Ass't U. S.
Attorney.

Offence charged Viol. Alaska Bone Dry Act—Pub.
No. 308.

Offence committed at Sitka on Dec. 1, 1921.

Place of arrest—Sitka.

Disposition of case—Defendant tried by jury, con-
victed and sentenced.

1922.

Jan. 9. Complaint sworn to and filed by H. D.
Stabler, Assistant United States Attor-
ney charging Harry Mabry with Violat-
ing the Alaska Bone Dry Act, Pub.
No. 308.

" 9. Warrant of arrest issued and placed with
Deputy U. S. Marshal S. G. Thomas
for service. Service was rendered and
the warrant was returned and filed,
being endorsed:

United States of America,
District of Alaska, Division No. 1,—ss.

I hereby certify that I received the within warrant at Sitka, Alaska, on the 9th day of January, 1922, by taking the within named *Harry Mabry* into my custody, and now produce him in court this 9th day of January, 1922.

GEO. D. BEAUMONT,
U. S. Marshall.
By S. G. Thomas,
Deputy.

- ” 9. Court convened at 9:30 o'clock A. M., defendant Harry Mabry present. The complaint was read to him and he informed as to his legal rights. A plea of "Not Guilty" was entered.
- ” 9. A jury order was issued and placed with Deputy Marshal S. G. Thomas for execution. The jury order was returned and filed, being endorsed:

"I hereby certify that I received the within jury order at Sitka, Alaska, on the 9th day of January, 1922, and that I served the same on the 9th day of January, 1922, by summoning the following to act as jurors in said above-entitled case; E. W. Merrill, D. R. Jennings, Felix Beauchamp, Sam Butts, C. Jay Mills, John Sarvela, P. Trieschield, C. C. Georgeson, Donald McGraw, John Gamble, Henry Woodruff and R. A. Buchanan.

Dated Jan. 9th, 1922.

GEO. D. BEAUMONT,

U. S. Marshal,

By S. G. Thomas,

Deputy.

" 9. A subpoena was issued for Mrs. Elizabeth Hollywood, Mrs. Bessie Coates, Mr. S. S. Thornton, Mrs. S. S. Thornton and George B. Rice to appear as witnesses on behalf of the plaintiff. The subpoena was placed in the hands of Deputy U. S. Marshal S. G. Thomas for service. Return was made and filed, being endorsed:

United States of America,
Territory of Alaska,—ss.

I hereby certify that I received the within subpoena on the 9th day of January, 1922, at Sitka, Alaska, *by reading and* showing the original and delivering a ticket containing the substance thereof to each of the within named witnesses personally.

Dated at Sitka, Alaska, Jan. 9th, 1922.

S. G. THOMAS,

Deputy U. S. Marshal. [21]

Jan. 9. Court convened to try this case at 11 o'clock A. M. January 9, 1922. Defendant Harry Mabry and his attorney Eiler Hanson present. Jury duly empanelled and sworn.

Witnesses for the plaintiff were sworn and their testimony taken.

Defendant presented no witnesses or evidence.

The attorneys in the case each presented their *their* argument to the jury.

After deliberation the jury returned a verdict of "Guilty."

In view of the evidence and the jury verdict, I have adjudged that Harry Mabry be imprisoned in jail for a period of four months and that he pay the costs of the action taxed at Ninety-three and 55/100 Dollars and that he pay a fine of Six Hundred Dollars and be imprisoned in jail until such fine and costs be paid, not to exceed three hundred days.

R. W. DeARMOND,
United States Commissioner
Ex-officio Justice of the Peace,
Sitka Precinct, Alaska.

- ” 14. Notice of appeal from judgment filed.
- ” 14. Bail bond filed and approved.
- ” 14. Order releasing defendant Harry Mabry from custody issued.

R. W. DeARMOND,
United States Commissioner
Ex-officio Justice of the Peace.

" 14. Transcript of docket and original papers mailed to the Clerk of the District Court, Juneau, Alaska.

R. W. DeARMOND,
United States Commissioner
Ex-officio Justice of the Peace,
Sitka Precinct, Alaska.

United States of America,
Territory of Alaska,
Precinct of Sitka,—ss.

I, R. W. DeArmond, United States Commissioner and *Ex-officio* Justice of the Peace, Sitka Precinct, First Judicial Division, Territory of Alaska, duly commissioned and sworn, hereby certify that the within is a true and correct transcript of all the docket entries in the matter of the United States versus Harry Mabry.

In witness whereof I hereunto set my hand and official seal at Sitka, Alaska, this 14th day of January, 1922.

[Seal] R. W. DeARMOND,
United States Commissioner and *Ex-officio* Justice of the Peace, Sitka Precinct, First Judicial Division, Territory of Alaska. [22]

[Caption and Title.]

**Notice of Motion to Dismiss Appeal and Affirm
Judgment.**

To Harry Mabry the above-named defendant, and to Wickersham and Kehoe, at Juneau, Alaska, his attorneys of record:

Please take notice that I will call up the annexed motion to dismiss appeal and affirm judgment for hearing before the Honorable T. M. Reed, Judge of the above-entitled court, in the courtroom thereof, at the hour of 10 o'clock A. M. on the 11th day of March, 1922.

Dated at Juneau, Alaska, this 8th day of March, 1922.

A. G. SHOUP,
United States Attorney.

Service of a true, full and correct copy of the within notice of motion to dismiss appeal and affirm judgment is hereby acknowledged this 8th day of March, 1922.

J. W. KEHOE,
Attorneys for Defendant.

Filed in the District Court, District of Alaska First Division Mar. 8, 1922. John H. Dunn, Clerk. By _____, Deputy. [23]

[Caption and Title.]

MOTION TO DISMISS APPEAL AND
AFFIRM JUDGMENT.

Comes now Arthur G. Shoup, United States Attorney for the First Division, District of Alaska, and appearing specially for the purpose of this motion only, moves the Court to dismiss the appeal of the above-named defendant taken from the United States Commissioner's Court for Sitka Precinct, Territory of Alaska, Division Number One, to the District Court, First Division, Territory of Alaska, and filed herein on the 18th day of January, 1922, and affirm the judgment of conviction of the said Commissioner's Court, which said judgment is as follows: That the above-named defendant pay a fine of \$600.00 and to serve three months' confinement in the jail at Juneau, Alaska, for the following reasons:

1. That this Court has not jurisdiction of the pretended appeal for the reason that no undertaking for costs and disbursements has been given by the appellant in this case as required by Sections 2551 and 2552 of chapter 43 of the Compiled Laws of Alaska.
2. That no appeal has been taken in the manner required by chapter 43, Compiled Laws of Alaska, of appeals from Justice's Courts in criminal actions.

Dated at Juneau, Alaska, this 8th day of March, 1922.

H. D. STABLER,
Sp. Asst. United States Attorney. [24]

[Caption and Title.]

1536—B.

Praecipe for Subpoena In a Case (For Outside Districts).

The Clerk of said court will issue subpoena directed to the United States Marshal for the 1st Division, District of Alaska, for the following-named persons to appear before said Court, at the United States Court Rooms, in Juneau, at 9 o'clock A. M., on the 14th day of March, 1922, then and there to testify in behalf of the United States.

Names:

Bessie Coates.

Elizabeth Hollywood.

Stanley Thornton.

Mrs. Stanley Thornton.

This 12th day of January, 1922.

A. G. SHOUP,

U. S. Attorney.

By H. D. Stabler.

Filed in the District Court, District of Alaska, First Division. Jan. 12, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy. [25]

In the United States District Court for the District
of Alaska, Division No. 1.

Office of U. S. Marshal, Juneau, Alaska. Received Jan. 12, 1922, Docket No. 11898, for service by Deputy Thomas.

United States of America,
Territory of Alaska,—ss.

Summons.

The President of the United States of America, to
Bessie Coates, Elizabeth Hollywood, Stanley
Thornton, Mrs. Stanley Thornton, GREETING:

You are hereby commanded to appear before the District Court of the United States, for the Territory of Alaska, at Juneau, in said District, on Tuesday the 14th day of March, A. D. 1922, at 10 o'clock A. M., of that day to testify as a witness on behalf of the plaintiff in the case of United States vs. Harry Mabry, 1536—B. HEREOF FAIL NOT.

Witness the Honorable T. M. REED, Judge of said Court, and the Seal thereof affixed at Juneau in said Territory, this 12th day of January, A. D. 1922.

[Seal]

JOHN H. DUNN,
Deputy.
By L. E. Spray,
Clerk.

Filed in the District Court, District of Alaska, First Division, Jan. 16, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy. [26]

United States of America,
District of Alaska, Division No. 1,—ss.

I, S. G. Thomas, Deputy U. S. Marshal for Division No. 1, District of Alaska, hereby certify that I received the within summons on the 14th day of January, 1922, and personally served the same upon the hereinafter named defendants by delivering to and leaving with each of said defendants personally a copy of said summons.

Dated January 14th, 1922.

S. G. THOMAS,
Deputy U. S. Marshal.

Names of Witnesses Served:

Bessie Coates.	Stanley Thornton.
Elizabeth Hollywood.	Mrs. Stanley Thornton.

[Caption and Title.]

Motion for Permission to File Additional Bond for Costs and Disbursements.

Comes now the above-named defendant, by his attorney, J. W. Kehoe, and moves this Honorable Court for permission to file in this cause an additional bond for costs and disbursements that may be incurred on appeal of the said cause in the above-entitled court.

Dated this 14th day of March, 1922.

J. W. KEHOE,
Attorney for Defendant.

Service of a full, true and correct copy of the within motion is hereby acknowledged this 14th day of March, 1922.

A. G. SHOUP,
U. S. Attorney.

Filed in the District Court, District of Alaska, First Division, Mar. 16, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [27]

[Caption and Title.]

No. 1536—B.

Undertaking on Appeal.

WHEREAS, the above-named defendant, Harry Mabry, has appealed from a judgment rendered against him in the United States Commissioner's Court for the Sitka Precinct, First Division, Territory of Alaska, on the 9th day of January, 1922, wherein said defendant Harry Mabry was sentenced to pay a fine of Six Hundred Dollars and to serve four months' confinement in the jail at Juneau, Alaska, for a violation of the Alaska Bone dry Law, to wit, Possessing Intoxicating Liquor at Sitka, Alaska, on the 1st day of December, 1921, in violation of said Alaska Bone Dry Law, which is an "Act to prohibit the Manufacture and Sale of Alcoholic Liquors in the Territory of Alaska, and for other purposes," enacted by the Congress of the United

States and aproved February 14th, 1917; and said defendant Harry Mabry, having filed with the Clerk of the District Court for the First Division, Territory of Alaska, at Juneau, Alaska, a transcript of the papers and records of the said trial in the said Commissioner's Court for the said Sitka Precinct, according to law; and the defendant Harry Mabry having served notice of appeal upon the plaintiff herein in said cause, and having filed the original of said notice, with the proof of service endorsed thereon, with the United States Commissioner for Sitka Precinct aforesaid:

NOW, THEREFORE, Harry Mabry, defendant, and Emery Valentine, of Juneau, Alaska, do hereby Undertake that said Harry Mabry shall pay all costs and disbursements that may be awarded against him on the appeal of the above-entitled cause.

EMERY VALENTINE.

United States of America,
Territory of Alaska,—ss.

I, Emery Valentine, being first duly sworn, deposite and say that I am a citizen of the United States of America, and a resident of the Territory of Alaska, and that I am not a councellor or attorney marshal, clerk of any court, or other officer of any court; that I am worth the sum of one thousand dollars over and above all just debts and liabilities and all property exempt from execution.

[Seal]

EMERY VALENTINE.

Subscribed and sworn to before me this 14th day of March, 1922.

J. W. KEHOE.

Approved as to the Sufficiency of Bond.

Judge, District Court.

Receipt of true copy acknowledged this 14th day
of March, 1922.

LESTER O. GORE,
Asst. U. S. Atty.

Filed in the District Court, District of Alaska,
First Division. Mar. 14, 1922. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [28]

[Caption and Title.]

Order Denying Motion for Permission to File Additional Bond for Costs and Disbursements.

This cause having come on to be heard on motion of J. W. Kehoe, attorney for the defendant herein, for permission to file an additional bond for costs and disbursements that might be incurred in the appeal of this cause in the above-entitled court, and the bond having been presented to the court on the 14th day of December, 1922, and the Court having read and considered the motion aforesaid—

IT IS ORDERED that the motion of defendant to file an additional bond for costs and disbursements aforesaid, be and the same is hereby denied as of the date of March 14th, 1922, and an exception is hereby allowed the defendant.

Dated this 16th day of March, 1922.

THOS. M. REED,
Judge, District Court.

Service of a true copy of the foregoing order is hereby acknowledged.

A. G. SHOUP,
U. S. Attorney.

Entered Court Journal No. I, page 183.

Filed in the District Court, District of Alaska, First Division. Mar. 16, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [29]

[Caption and Title.]

No. 1536—B.

Order Dismissing Appeal and Affirming Justice Court Judgment.

The within matter coming on for hearing on the 11th day of March, 1922, on the motion of the United States Attorney to dismiss the appeal taken in said cause from the United States Commissioner's Court for Sitka Precinct, Territory of Alaska, to the District Court for the District of Alaska, Division No. 1, at Juneau, for the reason that no undertaking for costs and disbursements had been filed by the defendant as required by law, and the United States appearing by H. D. Stabler, Special Assistant United States Attorney, and the appellant appearing by Wickersham and Kehoe, his attorneys of record, and it appearing to the Court that the undertaking for costs and disbursements that may be awarded against the appellant on the appeal has not been made and filed in said appeal as required

by law, and it appearing, therefore, that this Court has not jurisdiction to hear said cause *de novo* on the appeal, therefore, it is ORDERED AND ADJUDGED that appellant's said appeal be, and the same hereby is, dismissed; and it is further ORDERED AND ADJUDGED that the judgment heretofore had in said cause in the United States Commissioner's Court for Sitka Precinct, on the 9th day of January, 1922, to wit, that the defendant serve three months' confinement in the jail at Juneau, Alaska, and to pay a fine of \$600.00 and the costs of the action be, and the same hereby is, affirmed; and it is further ORDERED AND ADJUDGED that the said appellant pay the costs and disbursements of the said appeal. To which order the defendants by his attorneys excepted and exception allowed.

Done in open court, this 16th day of March, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Mar. 16, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [30]

Entered Court Journal No. I, page 182.

[Caption and Title.]

No. 1536—B.

Order for Bench-Warrant.

The appeal of the above-named defendant having been this day dismissed, and the judgment rendered

against said defendant in the United States Commissioner's Court, at Sitka, Alaska, on the 9th day of January, 1922, having been affirmed, and said defendant not appearing, it is ORDERED that a bench-warrant be issued upon the application of the United States Attorney, directing the United States Marshal to take said defendant into his custody.

Dated at Juneau, Alaska, this 16th day of March, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Mar. 16, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. I, page 183. [31]

Certificate.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full, true and correct copy of the original transcript on appeal from the United States Commissioner's Court at Sitka, Alaska, with all records and papers filed in the District Court for the District of Alaska, Division No. 1, in Cause No. 1536—B, United States of America vs. Harry Mabry, on file and of record in my office, at this date.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said court at Juneau, Alaska, this 24th day of March, 1922.

[Seal]

JOHN H. DUNN,
Clerk.

By L. E. Spray,
Deputy.

Filed in the District Court, District of Alaska, First Division. Mar. 25, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy.

Service is admitted this 25th day of March, 1922, of a copy of the within record and files, certified by J. W. Kehoe, attorney for petitioner.

GEO. D. BEAUMONT,
U. S. Marshal. [32]

[Caption and Title.]

No. 2169-A.

Order Granting Writ of Habeas Corpus.

Upon reading and filing the petition of Harry Mabry, the above-named plaintiff, duly signed and verified by him, whereby it appears that said Harry Mabry is illegally imprisoned and restrained of his liberty by George D. Beaumont, United States Marshal for the territory of Alaska, First Division, at the Federal Jail in the United States Courthouse, in the city of Juneau, Alaska, and stating wherein the illegality consists, from which it appears to me that a writ of habeas corpus ought to issue:

IT IS ORDERED that a writ of habeas corpus issue out of and under the seal of the said District Court for the territory of Alaska, First Division, Juneau, directed to the said George D. Beaumont, United States Marshal, as aforesaid, commanding him to have the body of the said Harry Mabry before me in the courtroom of the said Court, in the said courthouse at Juneau, Alaska, on the 28th day of March, 1922, at 10 o'clock A. M. of that day, to do and receive what shall then and there be considered and adjudged concerning the said Harry Mabry, together with the time and cause of his detention, and that he have then and there the said Writ.

Done at the courthouse, at Juneau, this 25th day of March, 1922.

THOS. M. REED,
Judge of the Said District Court.

Filed in the District Court District of Alaska, First Division. Mar. 25, 1922. John H. Dunn, Clerk. By_____, Deputy.

Entered Court Journal No. R, page 119. [33]

[Caption and Title.]

No. 2169-A.

Writ of Habeas Corpus.

The United States of America.

To George D. Beaumont, United States Marshal,
First Division, Alaska, Juneau.

WE DO HEREBY COMMAND YOU that you have and produce the body of Harry Mabry, the

plaintiff and petitioner herein, now imprisoned and restrained by you as such United States Marshal by whatsoever name he may be charged or called, and certify and return therewith the time and cause of his imprisonment or restraint before the Honorable Thos. M. Reed, Judge of the District Court for the Territory of Alaska, First Division, at the courtroom of said Court in the United States courthouse at Juneau, Alaska, on the 28th day of March, 1922, at the hour of 10 o'clock A. M., of that day, to do and receive what shall then and there be adjudged and considered concerning him, the said Harry Mabry.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS the Honorable THOS. M. REED, Judge of the District Court for the Territory of Alaska, First Division, Juneau, at the courtroom of said court in said Juneau, Alaska, this 25th day of March, 1922.

ATTEST my hand and seal of said District Court, the day and year last above written.

[Seal] JOHN H. DUNN,
Clerk District Court for the Territory of Alaska,
First Division at Juneau, Alaska. [34]

[Caption and Title.]

Return to Writ of Habeas Corpus.

In obedience to the within writ, I certify and return to the District Court for the District of

Alaska, Division Number One, that before the coming of said writ to me, to wit, on the 9th day of January, 1922, at Sitka, Alaska, pursuant to the judgment made and entered in the United States Commissioner's, *Ex-officio* Justice of the Peace, Court at Sitka, Alaska, a copy of which judgment is hereto annexed, I committed the within-named petitioner, Harry Mabry, to the United States Jail, at Sitka, Alaska, that thereafter, to wit, on the 14th day of January, 1922, I discharged said Harry Mabry from custody in obedience to order of R. W. DeArmond, Commissioner and *Ex-officio* Justice of the Peace in and for the Precinct of Sitka, District of Alaska, Division No. 1, pending an appeal from said judgment, a copy of which order is hereto attached, and thereafter, to wit, on the 24th day of March, 1922, pursuant to an order made by this Honorable Court dismissing said appeal and affirming said Justice Court judgment, dated the 16th day of March, 1922, a copy of which is hereto attached, the said Harry Mabry voluntarily surrendered himself into my custody in execution of said Justice Court Judgment and order dismissing said appeal, and I thereupon committed said Harry Mabry to the United States jail at Juneau, Alaska, where he has since been confined; to all of which I hereby certify and have here with me the body of said Harry Mabry, as by the said writ commanded.

Dated at Juneau, Alaska, this 28th day of March, 1922.

GEO. D. BEAUMONT,
United States Marshal. [35]

COPY.

[Caption and Title.]

ORDER DISMISSING APPEAL AND AFFIRMING JUSTICE COURT JUDGMENT.

The within matter coming on for hearing on the 11th day of March, 1922, on the motion of the United States Attorney to dismiss the appeal taken in said cause from the United States Commissioner's Court for Sitka Precinct, Territory of Alaska, to the District Court for the District of Alaska, Division No. 1, at Juneau, for the reason that no undertaking for costs and disbursements had been filed by the defendant as required by law, and the United States appearing by H. D. Stabler, Special Assistant United States Attorney, and the appellant appearing by Wickersham and Kehoe, his attorneys of record, and it appearing to the Court that the undertaking for costs and disbursements that may be awarded against the appellant on the appeal has not been made and filed in said appeal as required by law, and it appearing therefore that this court has not jurisdiction to hear said cause *de novo* on the appeal, therefore, it is ORDERED AND ADJUDGED that appellant's said appeal be, and the same hereby is, dismissed; and it is further ORDERED AND ADJUDGED that the judgment heretofore had in such cause in the United States Commissioner's Court for Sitka Precinct, on the 9th day of January, 1922, to wit, that the defendant serve three months' confinement in the jail at Ju-

neau, Alaska, and to pay a fine of \$600.00, and the costs of the action be, and the same hereby is, affirmed; and it is further ORDERED AND ADJUDGED that the said appellant pay the costs and disbursements of the said appeal. To which order the defendant by his attorneys except and exception allowed.

Done in open court, this 16th day of March, 1922.
THOS. M. REED,
Judge.

I certify the foregoing is a full, and true copy of certified copy of the original *thereof* delivered to me by the clerk of the above-entitled court.

GEO. D. BEAUMONT,
U. S. Marshal. [36]

(COPY.)

[Caption and Title.]

JUDGMENT.

Violation of Alaska Bone Dry Law—Pub. No. 308.

On the 9th day of January, 1922, the above-named Harry Mabry having been brought before me, R. W. DeArmond, a U. S. Commissioner and *Ex-officio* Justice of the Peace at Sitka, Alaska, in a criminal action for the crime of violating the Alaska Bone Dry Law and the said Harry Mabry having pleaded not guilty and been duly tried by jury trial and upon such trial Harry Mabry having been duly convicted, I have adjudged that he be imprisoned in the jail at Sitka for four months

and that he pay the costs of the action taxed at Ninety-three and 55/100 Dollars, and that he pay a fine of Six Hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding three hundred days.

In Witness Whereof I have set my hand at Sitka, Alaska, this 9th day of January, 1922.

[Seal] R. W. DeARMOND,
U. S. Commissioner and *Ex-officio* Justice of the
Peace.

A true copy of the original entry of judgment.

[Endorsed]: United States of America, District
of Alaska,—ss.

I certify that I received the within commitment on the 9th day of January, 1922, and executed the same on the 9th day of January, 1922, by delivering the within-named defendant to the jailer of the U. S. jail, at Sitka, Alaska.

GEO. D. BEAUMONT,
U. S. Marshal.
By S. G. Thomas,
Deputy U. S. Marshal.

I certify the foregoing is a full, and true copy of a certified copy of the original thereof delivered to me by R. W. DeArmond, Commissioner for the Sitka Precinct, Dist. of Alaska.

GEO. D. BEAUMONT,
U. S. Marshal. [37]

Order Releasing Defendant from Custody.

In the United States Commissioner's *Ex-officio* Justice Court, Sitka Precinct, Judicial Division Number One, Territory of Alaska.

To the United States Marshal, First Judicial Division, Territory of Alaska.

Harry Mabry, who is detained by you in execution of a judgment whereby he is condemned to serve an imprisonment in the Juneau Jail for a period of four months and that he pay the costs of this action taxed at Ninety-three and 55/100 (\$93.55) Dollars, and that he pay a fine of Six Hundred (\$600.00) Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding three hundred days, having appealed from said judgment and given sufficient bail to abide and perform the judgment of the Appellate Court, you are commanded forthwith to discharge him from your custody.

January 14, 1922.

[Seal]

R. W. DeARMOND,

United States Commissioner Ex-officio Justice of
the Peace, Sitka, Precinct, Territory of
Alaska.

I certify the foregoing is a full, true and correct copy of the original thereof.

GEO. D. BEAUMONT,
U. S. Marshal.

Filed in the District Court District of Alaska,
First Division, Mar. 29, 1922. J. H. Dunn, Clerk.
By_____, Deputy. [38]

[Caption and Title.]

2169—A.

Order Discharging Writ of Habeas Corpus.

This day came the petitioner, Harry Mabry, in person and by his attorneys, Wickersham and Kehow, and also the said George D. Beaumont, United States Marshal, defendant, in person and represented by the United States Attorney, Arthur G. Shoup, and H. D. Stabler, his assistant, and this cause having been fully heard on the petition for the writ of habeas corpus, and upon said writ, and the return of the said Marshal thereto, and upon the evidence introduced, and the court having heard the arguments of counsel for the parties, and being fully advised in the premises, doth find and adjudge that the petitioner, Harry Mabry, is legally and rightfully held in custody by virtue of the judgment of conviction aforesaid by said R. W. DeArmond, as United States Commissioner and *Ex-Officio* Justice of the Peace, in and for the Sitka precinct, first division, Alaska, which judgment was made and entered by the said justice in the said criminal action of the United States vs. Harry Mabry, on the 9th day of January 1922, then pending in that said Justice's Court in said precinct, and is fully set out in the petition of the petitioner for habeas corpus in this case, which said judgment of conviction so made and entered in said Justice's Court was affirmed by the order of this Court on the 16th day of March, 1922, dismissing the attempted appeal of this

petitioner from said judgment in said Justice's Court, and which said order of affirmance so made on the 16th day of March, 1922, by this [39] Court is set out in full in the said petition of Harry Mabry in his said petition herein for the writ of habeas corpus in this case; and which two said judgments are the same as those set out in the return of the said Marshal as his warrant and authority for holding and imprisoning the said Harry Mabry, the petitioner and plaintiff in this case:

It is ORDERED and adjudged that the said Harry Mabry be, and he is hereby, remanded to the custody of the said George D. Beaumont, United States Marshal, aforesaid and that the said Marshal, hold and imprison the said Harry Mabry in the jail as aforesaid, as provided and commanded by the said judgment of the said justice of the peace and as affirmed by the said judgment of this Court so made and entered of record herein on the said 16th day of March, 1922, as said judgments are set out and described in the return of the said Marshal in this case.

To all of which the petitioner and plaintiff in this case hereby excepts and said exception is allowed and noted herein.

Done in open court this 3d day of April, 1922.
THOS. M. REED,
District Judge.

Filed in the District Court District of Alaska,
First Division. Apr. 3, 1922. J. H. Dunn, Clerk.
By_____, Deputy.

Entered Court Journal No. R, page 130. [40]

[Caption and Title.]

Bill of Exceptions.

BE IT REMEMBERED, that on the 28th day of March, 1922, being the time set for the return of the writ of habeas corpus issued by this court in this cause, the petitioner, Harry Mabry, appeared in court in the custody of George D. Beaumont, the United States Marshal of this division, the defendant in this action, and thereupon the said defendant filed his Return to the writ of habeas corpus issued in this case, which return on being read by the attorney for the said petitioner was excepted to by him for said petitioner and an oral denial was made to so much thereof as alleged that the petitioner voluntarily surrendered himself into the custody of the said marshal and voluntarily yielded to the restraint and imprisonment complained of in the petition herein for the writ, and thereupon the judge of this court asked if petitioner desired to offer any testimony in denial thereof, and whereupon counsel for the petitioner asked leave of the Court to introduce testimony in denial thereof, and leave of the Court being had called George D. Beaumont and Harry Mabry as witnesses who being first duly sworn gave the following testimony, to wit:

James Wickersham appeared for plaintiff. A. G. Shoup, U. S. Attorney and H. D. Stabler, Special Asst. U. S. Attorney, appeared for defendant.

And thereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit: [41]

Testimony of George D. Beaumont, for Plaintiff.

GEORGE D. BEAUMONT, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. WICKERSHAM.

Q. State your name and official position.

A. George D. Beaumont, United States Marshal.

Q. First Division, Territory of Alaska?

A. First Division, Territory of Alaska.

Q. In this return, in the case of Mabry against Beaumont, habeas corpus, in your return to the writ of habeas corpus, I notice that you state that "the said Harry Mabry voluntarily surrendered himself into my custody, in execution of said Justice Court judgment and order dismissing said appeal." I wish you would state what occurred in relation to his first incarceration.

Mr. SHOUP.—If the Court please, I object to that as irrelevant and immaterial, and on the ground that it is on the second incarceration.

The COURT.—Objection sustained.

Mr. WICKERSHAM.—Well, that's merely preliminary.

The COURT.—Well, the only question at issue is whether he voluntarily surrendered himself.

Mr. WICKERSHAM.—Yes, but I wanted to show all the circumstances.

(Testimony of George D. Beaumont.)

The COURT.—I don't care about going into all the circumstances.

Mr. WICKERSHAM.—I note an exception.

Q. You had Mabry in your possession here under a warrant, but you say in here that he was discharged upon giving an appeal bond?

A. Yes, sir.

Q. He was taken into your custody again the second time?

A. He came up to my office.

Q. Who came with him?

A. He came into the office alone.

Q. Do you know whether or not he had been sent for? [42]

A. He had not.

Q. Do you know whether or not your man was out looking for him?

A. Well, I sent Mr. Thomas—told Thomas that if he said Mabry to tell him to come up.

Q. Do you know that Mr. Thomas was in my office looking for him? A. No, I do not.

Q. Do you know that he went from there down to the hotel, looking for him? A. No, I don't.

Q. You don't know anything about that?

A. He made no report to me. I just told him. I asked him if he saw Mabry come over on the boat, and he said he did. "Well," I said, "where is he"? and he said, "I don't know. He's in town." I said, "If you see him, you better tell him to come up here." And the next I knew Mabry came into my office and I said, "Are you ready to go down-

(Testimony of George D. Beaumont.)

stairs"? and he said, "I am." So I put him down-stairs.

Q. You had then, process for his incarceration, according to your report? A. Yes, sir.

Q. And had a man out looking for him?

A. No, sir; not looking for him.

Q. Thomas was out looking for him?

A. I don't know; I couldn't say as to that. I told Thomas, "If you see him, tell him he better come up."

Q. When was that?

A. That was the morning Mabry came in.

Q. How long before Mabry came in?

A. Oh, probably an hour.

Q. But he is being held now under the original writ according to your report and the order of the Court dismissing the case? A. Yes, sir.

Q. That's all you know about that particular matter? A. That's all that I know?

Mr. WICKERSHAM.—That's all.

Mr. SHOUP.—No cross-examination. [43]

Testimony of Harry Mabry, in His Own Behalf.

HARRY MABRY, the plaintiff herein, called as a witness on his own behalf, was examined and testified as follows:

Direct Examination by Judge WICKERSHAM.

Q. On the morning of the 24th of this month—I think it was last Friday—did you come into my office? A. Yes, sir.

Q. What did you learn with respect to some of

(Testimony of Harry Mabry.)

the marshals looking for you? How soon after that?

A. Well, I went back to the Alaskan Hotel—

Q. (Interposing) Yes.

A. And Mr. Thomas came in and told me that I was wanted at the marshal's office.

Q. And what did you do thereupon?

A. I called you up and told you that "they are here, after me now." In fact, you told me if the marshal come around to pick me up for me to call you up, which I did from the Alaskan Hotel.

Q. Who is the Mr. Thomas that told you that the marshal wanted you?

A. He's the marshal from Sitka.

Q. He is the marshal from where?

A. From Sitka.

Q. He is the United States Deputy Marshal from Sitka, Alaska? A. Yes, sir.

Q. Where did he meet you in the hotel?

A. In the hotel lobby.

Q. Now, just relate all that was said.

A. He just come up to me and told me that I was wanted at the marshal's office, and I asked him if I should go up right away and he said, "Yes," that I should go with him.

Q. Do what?

A. He said that I should come along with him.

[44]

Q. And did you?

A. Yes, but I called you up, and there was a man behind the desk that heard me also.

(Testimony of Harry Mabry.)

Q. How far did you come with him?

A. He just went to the courthouse with me.

Q. Did you know who he was? A. Yes, sir.

Q. How long have you known Thomas?

A. Well, I have known him, oh, a couple of years.
I knew him before he went into office.

Q. He is the marshal who has been over at Sitka?

A. Yes.

Q. What did he have for arresting you in the first place?

A. In Sitka he had a warrant—I suppose he did.

Q. Did he exhibit any papers to you here the other day when he re-arrested you? A. No.

Q. Why did you come with him?

A. He was the marshal. I supposed he had a right to take me.

Q. And you came with him for that reason?

A. Yes, sir.

Q. Where did you come to?

A. Came to the marshal's office, downstairs.

Q. And went in. I think that is sufficient.

Judge WICKERSHAM.—That's all.

Petitioner rested. No other testimony. [45]

[Caption and Title.]

No. 2169—A.

Certificate of Official Reporter.

I hereby certify that I am the official reporter for the United States District Court, First Division of

Alaska; that I reported the testimony given at the trial of the above-entitled cause, and that the foregoing is a full, true and correct transcript of all evidence given and proceedings had at said hearing.

Dated this third day of April, 1922.

G. W. FOLTA,
U. S. Court Reporter. [46]

Whereupon after hearing the said witnesses and their testimony aforesaid, and after also hearing the arguments of counsel on the issues presented by the petition for the writ, and the writ, and the return so made thereto by the marshal, and being fully advised on all the facts in the case, took the matter under advisement until the 3d day of April, 1922, at which time he will render his opinion in this case and render judgment therein.

The above bill of exceptions being true and correct, is now allowed, settled and signed, and I do hereby certify that the foregoing and included testimony of the witnesses George D. Beaumont and Harry Mabry is the only and all the testimony offered and taken and heard by the Court in this case, on the trial of any of the issues therein.

Settled, allowed and signed in open court on this the 3d day of April, 1922.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 3, 1922. J. H. Dunn, Clerk.
By —————, Deputy. [47]

[Caption and Title.]

No. 2169—A.

**Memorandum Opinion on Petition for Writ of
Habeas Corpus.**

Messrs. WICKERSHAM & KEHOE, for Plaintiff.
United States Attorney A. G. SHOUP and Assistant
United States Attorney H. D. STABLER,
for Defendant.

The petitioner, Harry Mabry, was convicted before the Commissioner and *Ex-officio* Justice of the Peace on January 9, 1922, on a complaint made by H. D. Stabler, Assistant United States Attorney, for having, on December 1, 1921, in his possession, intoxicating liquors, and a judgment was entered thereon by the justice on the same date. The petitioner thereafter, on January 14, 1922, served and filed a notice of appeal from said judgment so given, but failed to file, within the thirty days allowed by the statute, an undertaking for costs and disbursements on the appeal, as required by Secs. 2551 and 2552, Compiled Laws of Alaska. On March 16, 1922, because of such failure, on motion of the United States Attorney, the appeal of petitioner was dismissed and, in compliance with Sec. 2559, Compiled Laws of Alaska, the judgment of the justice was affirmed by this Court and the petitioner committed to the custody of the United States Marshal, in accordance with the original judgment of the justice. The petitioner, on March 25, 1922,

filed his petition for a writ of habeas corpus, praying that he be discharged from custody, on the ground that he was illegally restrained of his liberty by the United States Marshal. Upon presentation of the petition, a writ was issued, returnable [48] March 28th, on which date the defendant, George D. Beaumont, United States Marshal, produced the prisoner into court and submitted his return.

The petitioner alleges that he has not been committed, and is not detained, by virtue of any judgment, decree, final order or process issued by a court or Judge of the United States in a case where such courts or Judges have jurisdiction, or by virtue of the final judgment or decree of a competent tribunal having jurisdiction, and is not imprisoned or restrained by virtue of any order or judgment specified in Sec. 1339, Compiled Laws of Alaska; that is to say, by virtue of a legal judgment of a competent tribunal of criminal or civil jurisdiction, or of an execution regularly or lawfully issued thereupon.

The petition thereafter states, as required by Section 1410, Compiled laws of Alaska, the cause and pretence of the restraint, to the effect that the petitioner was complained of by one H. D. Stabler, before R. W. DeArmond, Commissioner and *Ex-officio* Justice of the Peace of the Sitka Precinct, in this Division and Territory, for an alleged violation of the Alaska Bone Dry Act, by charging petitioner with having had in his possession, in said precinct, intoxicating liquor, on December 1, 1921; that the complaint aforesaid was filed with the Commissioner

on January 9, 1922, and upon the filing of said complaint, the Commissioner issued a warrant of arrest, and so forth, as stated in the opening paragraphs hereof.

The specifications of the alleged unlawful detention and restraint of petitioner consist of twelve separate allegations which may be summarized in condensed form as follows:

1. That the judgment of the Justice of the Peace or Commissioner is not based upon any crime known by the laws of the United States and the pretended crime therein set forth is not [49] a crime known to the law.
2. That the said pretended judgment being void for want of jurisdiction, all subsequent proceedings were void.
3. That such judgment, being void and in excess of the jurisdiction of the Justice Court, all subsequent proceedings and judgment of this court were void and the restraint of defendant is without authority of law.
4. That the complaint against the defendant, filed in the Justice Court, was in violation of Sec. 28 of the act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," approved February 14, 1917, and was made without authority of law and did not state facts sufficient to constitute a crime or give the Justice Court jurisdiction to hear, try or sentence the petitioner.
5. That the warrant upon which the petitioner was arrested and brought before the Commissioner

was void and illegal and in direct violation of Sec. 2384, Compiled Laws of Alaska, in that it did not state that any crime had been committed by petitioner.

6. That the verdict of the jury rendered against the petitioner was void in that it did not state that the petitioner was guilty of any crime and did not afford any jurisdiction to enter any judgment thereon.

7. Because the judgment so entered was null and void in that it ordered the defendant imprisoned in the Sitka jail until the costs of the case were paid.

8. Because the docket entries show that the alleged charge against the petitioner was not a crime and that, therefore, subsequent proceedings were void.

9. Because the sentence of the justice for a period of imprisonment in jail of four months and an additional 300 days, as [50] therein stated, exceeds the jurisdiction of the justice and was null and void.

10. That the dismissal of the appeal from the Justice Court of the petitioner was without authority of law and was without jurisdiction and void.

11. That the order of the issuance of a bench-warrant for the arrest of the defendant was null and void and in excess of the jurisdiction of the court.

12. That the restraint and imprisonment of defendant under the judgment of the justice of Janu-

ary 9, 1922, and of this Court of March 24, 1922, is illegal and without authority of law.

Attached to and made a part of the petition are certified copies of the record of the proceedings in the case of the United States vs. Mabry, initiated in the Commissioner's Court of the Sitka Precinct, this Division, on January 9, 1922, and ending with the dismissal of an appeal from the judgment of conviction in the Justice Court, by this court on the 24th day of March, 1922. This record discloses that on January 9, 1922, H. D. Stabler, Assistant United States Attorney, filed with the Commissioner and *Ex-officio* Justice of the Peace of the Sitka Precinct, First Division, Territory of Alaska, a complaint accusing the petitioner of a violation of Sec. 1 of the act of Congress approved February 14, 1917, entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes. The complaint, after entitling the court and cause, charges as follows:

"Harry Mabry is accused by H. D. Stabler in this complaint of the crime of possessing intoxicating liquors, committed as follows, to wit:

"The said Harry Mabry, in the District of Alaska and within the jurisdiction of this court, did wilfully and unlawfully, on the first day of December, 1921, at Sitka, Alaska, and in S. S. Thornton's residence, near the Russian Greek Church, at Sitka, Alaska, then and there have in his [51] possession, intoxicating

liquor, to wit. moonshine whiskey, contrary to the statutes in such cases made and provided, an against the peace and dignity of the United States.

(Sgd.) "H. D. STABLER,
"Asst. U. S. Attorney."

The complaint was sworn to by H. D. Stabler before the Commissioner and filed in his office on the ninth of January, 1922, and on the same date the Commissioner issued a warrant for the arrest of the petitioner. The warrant is in the form prescribed by Sec. 2385, Code of Criminal Procedure, except that the crime of which the defendant is accused was therein designated as "Violating the Alaska Bone Dry Act, Pub. No. 308," and to this defect the petitioner now takes exception. The defendant-petitioner was taken into custody by the marshal on the date of the issuance of the warrant and, as appears from the transcript of record from the Justice Court, on being brought before the justice, entered a plea of not guilty, demanded a jury trial and was tried and found guilty. The verdict of the jury, which is also excepted to by the counsel for defendant as being insufficient to give the Court jurisdiction, is as follows:

“In the United States Commissioner’s Court, Sitka
Precinct, Division No. 1, Territory of Alaska.

“UNITED STATES OF AMERICA,
vs.

“HARRY MABRY.

JURY VERDICT.

“We, the undersigned jurors in the above matter,
duly summoned and impanelled, after hearing the
evidence presented and giving sincere consideration
to the same, find the defendant Harry Mabry
guilty.”

(Sgd. by twelve jurymen.)

Thereupon the Commissioner sentenced the de-
fendant.

A certified copy of the judgment entry of the
sentence, as appears from the docket of the justice,
is made a part of the record of the petitioner, and
as the petitioner bases his main [52] contention
as to the illegality of his arrest and confinement on
this judgment, I give it in full, as follows:

“Justice Court for the District of Alaska, Division
No. 1, at Sitka.

“THE UNITED STATES
vs.

“HARRY MABRY,
Defendant.

Violation of Alaska Bone Dry Law Pub. No. 308.

"On the ninth day of January, 1922, the above-named Harry Mabry, having been brought before R. W. DeArmond, the United States Commissioner and *Ex-officio* Justice of the Peace at Sitka, Alaska, in a criminal action for the crime of violating the Alaska Bone Dry Law, and the said Harry Mabry having pleaded not guilty and being duly tried by a jury trial and upon such trial Harry Mabry having been duly convicted, I have adjudged that he be imprisoned in jail at Sitka for four months and that he pay the costs of the action taxed at \$93.55, and that he pay a fine of \$600 and be imprisoned in such jail until such fine and costs have been paid, not exceeding 300 days."

On January 11, 1922, the record further shows that the defendant filed with the Commissioner a notice of appeal to this court and on the same date filed an undertaking on bail on appeal, as provided by Sec. 2325, and Sec. 2328, Compiled Laws of Alaska, and thereupon the petitioner was released from the custody of the marshal. On March 8, 1922, the United States Attorney filed his motion to dismiss the appeal because no undertaking for costs and disbursements on appeal, as required by Sec. 2551 and Sec. 2552, Compiled Laws of Alaska, had been given by the defendant. This motion was heard in chambers on March 11, 1922, and on March 14 the defendant moved to file a bond for costs and disbursements on appeal, which motion was denied on March 16 as of the date of the 14th, because this Court found that no undertaking, or what pur-

ported to be in the nature of a bond or undertaking on appeal had been filed within the thirty days required from the time of the entry of the judgment; that the undertaking filed by defendant was a bail bond only and could not be amended as a defective [53] undertaking and bond for costs on appeal, under the provisions of Sec. 2560, Compiled Laws of Alaska.

Thereupon the defendant presented this, his petition, for a writ of habeas corpus, alleging that he is, for the several reasons set forth in his petition and above stated, unlawfully restrained of his liberty by the United States Marshal. The return of the United States Marshal alleges that the petitioner was in custody by virtue of the aforesaid judgment of the justice and the order and judgment of this court, affirming the judgment of the justice. He further returned that the petitioner voluntarily surrendered himself into custody by virtue of said judgment. That part of the return of the United States Marshal stating that the petitioner voluntarily surrendered himself to the United States Marshal was controverted by the petitioner and thereupon testimony was taken, from which it appears that the surrender of the defendant to the custody of the United States Marshal was not voluntary, but was made on demand of the United States Marshal that he do so, the United States Marshal having the commitment in his possession.

The case has been ably argued by the counsel for petitioner, the United States Attorney appearing *in contra*. The United States Attorney takes the

position that the defects or errors pointed out by petitioner were not jurisdictional and were such as could be corrected by writ of error or appeal in the original case and that therefore the remedy of *habeas corpus* would not lie. It is well settled that the writ of *habeas corpus* cannot be put to the use of reviewing judgments or orders made by a judge or court acting within his or its jurisdiction. The functions of the writ, where a party who has applied for its aid is in custody, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued and the validity of the process upon its face. [54]

See Savin petitioner, 131 U. S. 267.

In re Coy, 127 U. S. 731.

Ex parte Yarborough, 110 U. S. 653.

Bailey on *Habeas Corpus*, par. 30.

The return of the United States Marshal shows that the petitioner is held by him under restraint by virtue of the judgment of this court dismissing the appeal from and affirming the judgment of the lower court, and the contention of the United States Attorney is that the petitioner is herein invoking the remedy by *habeas corpus* as an anticipatory writ of error; that if the lower court had jurisdiction of the case as disclosed and jurisdiction of the person, correction of errors and irregularities cannot be made by a writ of *habeas corpus*. Counsel for petitioner, on the other hand, contends that the judgment of the lower court was absolutely void in not disclosing with certainty the crime of which the defendant was convicted, and that the affirmation

thereof by this court was equally void because the judgment of this court had no more force and effect than the original judgment of which it was an affirmation.

In this connection, the point was made by the Government that the petitioner, in his position, is inconsistent even to the point of an estoppel, in that he sought to appeal from the judgment of the lower court and voluntarily sought to invoke the jurisdiction of this court to try the case *de novo*. Having done so, he stands now in an inconsistent position by placing himself apparently within the rule of employing the writ as an anticipatory writ of error.

In the case of Henry vs. Henkle, 235 U. S. 228, the Supreme Court lays down the rule as to how far the court should go into the record on a petition for a writ of habeas corpus, in the following language. [55]

“In view, however, of the nature of the writ and the character of the detection under a warrant, no hard and fast rule has been announced as to how far the Court will go in passing upon questions raised in habeas corpus proceedings. In cases which involve a conflict of jurisdiction between state and federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in *Ex parte Royal*, 117 U. S. 241; *Ex parte Lang*, 18 Wallace 163; *New York vs. Eno*, 155 U. S. 89; *In re Loney*, 134 U. S. 372, the Court hearing the application will

carefully inquire into any matter involving the legality of the detention and remand or discharge, as the facts may require. But barring such exceptional cases, the general rule is that on such application, the hearing should be confined to the single question of jurisdiction, and even that will not be decided in every case in which it is raised."

The case of *Ex parte Royal* was a case wherein a writ was prayed for on the ground that the petitioner was confined under a state statute alleged to be in conflict with the Constitution of the United States. The case of *Ex parte Lang* arose on the point as to whether a second sentence of imprisonment could be imposed by the Court during the same term of court, after the court had theretofore imposed a sentence of fine and imprisonment contrary to law, the Court holding that the authority of the lower court was ended with the first judgment. The cases of *New York vs. Eno* and *In re Loney* are cases involving the question whether the offenses therein referred to were cognizable exclusively under the laws of the State or the United States or by both, and all turn to a large extent upon the question of the jurisdiction of the specific courts to entertain the original action.

In the case of *Glasgow vs. Moyer*, 225 U. S. 420, the Supreme Court, through Mr. Justice McKenna, uses this language, which is very pertinent in the instant case, as disposing of several grounds for the discharge of the prisoner, urged by counsel for petitioner. Justice McKenna says: [56]

"The writ of habeas corpus cannot be made to perform the office of a writ of error. This has been decided many times and, indeed, was the ground upon which a petition of the applicant for habeas corpus to this court before trial was decided. It is true, as we have said, that the case had not been tried, but the principle is as applicable and determinative after trial as before trial."

This was decided in one of the cases cited, *In re Lincoln* (208 U. S. 178), which cited other cases to the same effect. *Harlan vs. McGourin* (218 U. S. 442) was an appeal from a judgment discharging a writ of habeas corpus petitioned for after conviction, and it was held that the writ could not be used for the purpose of proceedings in error, but was confined to a determination whether the restraint of liberty was without authority of law.

"In other words," as it was said, "upon habeas corpus the court examines only the power and authority of the court to act and not the correctness of its conclusions. *Matter of Gregory* (219 U. S. 210) was a writ of habeas corpus brought after conviction and we said that we were not concerned with the question whether the information upon which the petitioner was prosecuted and convicted was sufficient or whether the case set forth in an agreed statement of facts constituted a crime—that is to say, whether the Court properly applied the law—if it be found that the Court

had jurisdiction to try the issues and to render the judgment."

The Court then says—

"The principle of the case is the simple one 'if the Court has jurisdiction of the case, the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other or of fact.' "

Again the Court, in the same case, says—

"The principle is not the least applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions like others, the court is invested with jurisdiction to try, if raised, and its decision can be reviewed like its decisions upon other questions, by writ of error."

After a further discussion, the court says that it would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after verdict. [57]

The question of the jurisdiction of the Commissioner and *ex-officio* Justice of the Peace at Sitka to hear and to try all classes of cases for violation of the Alaska Bone Dry Act of Congress, approved February 14, 1917, is not seriously questioned by counsel for petitioner. Sec. 28 provides to that effect in the following language:

"That prosecutions for violations of the provisions of this act shall be on information,

filed by any such officer, before any justice of the peace or district judge, or upon indictment by the grand jury of the Territory of Alaska; and said United States District Attorney or his deputy, shall file such information upon presentation to him, or his assistants, of sworn information that the law has been violated."

But counsel for petitioner urges that the said section provides that the prosecution shall be on information, while in the case under discussion the prosecution was upon a complaint filed by one purporting to be the Assistant United States Attorney, and he further contends that the United States Attorney or his assistant can file such information only upon a sworn information being presented to him of the violation of the law, and that therefore the justice had no jurisdiction of the offense.

The interpretation given by counsel as to the authority of the United States Attorney or his assistants to file an information I cannot agree with. A reasonable construction of the statute is that when a sworn information is presented to the United States Attorney or his assistants of a violation of the law, he shall file an information. In other words, the section makes it the mandatory duty of the United States Attorney, upon the presentation to him, under oath, of information of the violation of the law, to file an information with the justice or court. The question of the validity of the accusation before the justice, as to whether it was an information or complaint, does not seem to be material. Sec. 2379, Compiled Laws, defines

information "as the allegation or statement made before a magistrate [58] and verified by the oath of the party making it, that a person has been guilty of some designated crime." The accusation in this case is designated as a complaint, but it fulfills, in every respect, the functions of an information. It alleges that the defendant-petitioner herein was, on the first day of December, 1921, at Sitka and within the jurisdiction of the court, guilty of having in his possession intoxicating liquors; that is to say, moonshine whiskey, contrary to the form of the statutes in such cases made and provided.

The common-law distinction between a complaint and an information is that the former is an accusation or charge against an offender made by a private person, under oath, to the justice of the peace or other proper officer, alleging that the offender has violated the law, while an information was an accusation filed by the prosecuting officer, charging an offense against the law. In the former the party making the accusation was known as the private prosecutor.

See Compiled Laws, Sec. 2521 and 2379,
Lincoln v. Smith, 27 Vt. 1,
In re Oliphant, 53 Am. Reports 681,
Simon v. Starr, 158 Ind. 55,
Clipper v. State, 4 Texas 242.

In the case of the United States vs. Mabry, under discussion, the designation of the instrument filed before the Justice is only a question of nomenclature. The instrument bears all the essentials of an information, both under the statute and at common

law, even were the petitioner authorized to raise the question under the authorities heretofore cited.

The objection raised as to the warrant for the arrest of the defendant cannot be considered at this time even if it were material. This objection is that the warrant did not designate [59] any crime of which the defendant was accused in the complaint—simply designating that he was accused of violating the Alaska Bone Dry Law. It appears that the defendant appeared in open court, was informed of the charge against him, plead to the accusation and was tried. The question of his original arrest cannot be before the court at this time if he had submitted to the jurisdiction of the justice.

The question before the Court, on the granting of a writ of habeas corpus in this proceeding, is whether the petitioner is at this time illegally restrained of his liberty. As was said by Justice Cayner for the Supreme Court of Iowa, in Addis vs. Applegate, 171 Iowa, 150, the primary question in all proceedings of this kind, is whether or not the applicant is illegally restrained of his liberty at the time the application is made. It is immaterial, so far as the right to the writ is concerned, whether or not he was originally restrained by criminal or civil process. The question to be determined on this hearing is, Is he now lawfully or unlawfully restrained.

The counsel for petitioner further contends that the verdict of the jury was not sufficient in that it failed to state that the defendant was guilty as charged in the complaint or information, but stated

only that the jury found him guilty. The verdict recites the court and cause and is sufficient in that respect. The Supreme Court of the United States, in Statler vs. U. S., 157 U. S. 277, uses the following language:

“It is settled, beyond question, that a verdict of guilty, without specifying any offense, is general and is sufficient and is to be understood as referring to the offense charged in the indictment.”

citing St. Clair vs. U. S., 154 U. S. 154.

In a trial *per pais* (8 ed. 1776, p. 287), the rule is thus stated: [60]

“If the jury give a verdict of a whole issue and of more, that which is more is surplusage and shall not stay the judgment; *per utile per inutile non vitiatur.*”

Bishop’s Criminal Procedure, page 623, Sec. 1005a, is substantially to the same effect, the words being:

“A finding of lay people need not be framed under the strict rules of pleading or after any technical form. Any words which convey the idea to the common understanding will be adequate, and all fair indictments will be made to support it. To say, therefore, that the defendant is guilty of an offense named which is less than the whole alleged, is sufficient without adding ‘as charged in the indictment,’ for the latter will be supplied by the construction. So likewise a general finding of guilty will be

interpreted as guilty of all that the indictment alleges."

This, to my mind, disposes of the objection that the verdict of the jury was void for uncertainty.

We now come to the objection raised to the judgment. The petitioner maintains that the judgment of the justice was void because not in compliance with Sec. 2539, Compiled Laws. This section provides that when a judgment of conviction is given upon a plea of guilty or upon a trial, the justice must enter the same in the Justice Docket substantially as follows:

"Justice's Court for the Precinct of _____, District of Alaska, Division No. .

"THE UNITED STATES OF AMERICA v. A B
(Day of the month and year.)

"The above-named A B having been brought before me, C. D, a commissioner and *ex-officio* justice of the peace, in a criminal action, for the crime of (briefly designate the crime), and the said A. B having thereupon pleaded 'not guilty' (or as the case may be), and been duly tried by me (or by a jury, as the case may be), and upon such trial duly convicted, I have adjudged that he be imprisoned in the county jail days and that he pay the cost of the action, taxed at dollars (or that he pay a fine of dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding days, as the case may be.)"

"C. D,

"Commissioner and *Ex-officio* Justice of the Peace."

This form was substantially followed by the justice in the judgment under consideration in all particulars except that, in designating the crime of which the defendant was convicted, it recites that the crime was a violation of the Alaska Bone Dry Act. Counsel contends that this does not designate any crime; that there may be several crimes charged under this act and that the words "Alaska Bone Dry Law" in themselves, are meaningless as designating the crime, and that, therefore, the judgment of the justice is void as not being in compliance with the statute aforesaid.

It will be noted that the provisions of Sec. 2539 refer to the entry in the justice docket by the justice after the judgment is pronounced and refers merely to the ministerial act of the entry in the docket. Sec. 2535 of the Compiled Laws, provides that when the defendant pleads guilty or is convicted, either by the justice or the jury, the justice must give judgment thereon for such punishment as may be described by law for the crime. This judgment may be given orally and usually is. Sec. 2539 provides that when a judgment of conviction is given, the entry must be made substantially in the form prescribed.

Conceding, under this view of the act, that the entry of the judgment by the justice did not substantially comply with the form prescribed, would it render the judgment void? To this we should look to the whole record and from it we find that the defendant was convicted of a violation of Sec. 1 of the act referred to, in that he had in his possession,

on December 1, 1921, intoxicating liquor, to wit, moonshine whiskey, and sentence was made as prescribed by law.

But counsel contends that we can only look to the judgment as spread on the docket of the justice and that no presumption [62] can be had as to the justice proceedings, a Justice Court not being a court of record.

It is well settled that where a justice of the peace has jurisdiction of a person or subject matter, any judgment rendered by him will be sustained on the same basis as that of a court of record. *In re Joseph*, 173 N. W. 358, the following from 12 R. C. L., p. 1192, is cited with approval:

“The judgment of an inferior court, such as a police court, mayors, magistrates or justices having jurisdiction conferred by law to try and dispose of a criminal case, is as conclusive and rests upon the same basis when jurisdiction is attached, as the adjudication of any common-law court.”

It is to be presumed that the judgment was properly given by the justice, therefore, in the present case. In addition, I am of the opinion that the judgment entry was a substantial compliance with the statute. Common usage has given the phrase “Alaska Bone Dry Law” a definite meaning. It is universally known as referring to the act of Congress entitled, “An Act to prohibit the manufacture or sale of alcoholic liquors in the territory of Alaska, and for other purposes.” It is so used by our Circuit Court of Appeals in the case of the United States

v. Abbate 270 Fed. 737, and in the case of Koppitz v. the U. S., 272 Fed. 96. In fact, the judgment in this case is identical in describing the offense with that used in the last-named case. Under the terms of the act of Congress known as the Alaska Bone Dry Act, the justice has jurisdiction over all offenses denounced by that act, and a person of common understanding, without looking further into the record than the judgment itself would know that the judgment was given for a violation of the act in question and that under the terms of the act itself the justice had jurisdiction of all offenses committed thereunder. [63]

If, as claimed by counsel for petitioner the words "Alaska Bone Dry Act" are meaningless and have no force and effect, then they could be rejected as surplusage and it is well settled by decisions of great weight that the omission to designate the crime of which defendant is found convicted in the judgment does not render the judgment void. At most it is a mere irregularity or informality. In *Ex parte Satt*, 129 N. W. 862, the Court say:

"Where accused was tried and sentenced in a court of competent jurisdiction, the defect in his commitment to the penitentiary, arising from a failure to recite the offense is not a ground for discharge on habeas corpus."

In the recent case of *Ex parte Thurston*, 233 Fed. 847, Judge Neterer of the District Court, Western Division of Washington, on a petition for a writ of habeas corpus by Thurston, who was confined to

the United States penitentiary at McNeil's Island, State of Washington, on a conviction for violation of Sec. 195 of the Criminal Code of Alaska, in effect decided as follows:

"Where the crime for which the accused was convicted and all the proceedings thereon through the trial and verdict, up to the conviction and sentence, appear on record, the fact that the judgment of sentence merely sentenced the accused to imprisonment in the penitentiary but did not cite the crime of which he was committed, will not warrant his release on *habeas corpus*, for the whole record, taken together, show the crime."

In the case of *Ex parte Gibson*, 31 Cal. 619, reported in 91 American Decisions, p. 546, the Supreme Court of California, through Justice Sanderson, rendered a very elaborate opinion on the subject, and I take the liberty to quote largely therefrom:

"The only objection urged against this judgment by counsel for the prisoner is, that it does not state the offense of which he was convicted; and in view of that omission, it is claimed that it is void, and therefore furnishes no legal warrant for the detention of the prisoner. This objection is founded upon the terms of section 462 of the criminal practice act, which requires the clerk, in entering a judgment of conviction, 'to state briefly the offense for which the conviction has been had.' [64]

"What the entry which contains the judg-

ment against a defendant in a criminal action ought regularly and properly to state, in order to fully satisfy the requirements of the law, is a question not at all difficult to answer. It ought to show that all the steps or acts required by the statute which regulates proceedings in criminal cases to be done at that stage of the case were performed. In cases where it is not lawful for the court to proceed to judgment in the absence of the defendant, as in felonies, it ought to show that the defendant was present in person. Criminal Practice Act, sec. 443. That he was informed by the Court or by the clerk under its direction of the nature of the indictment, of his plea, and if his plea was "not guilty" of the nature of the verdict; and that he was asked whether he had any legal cause to show why judgment should not be pronounced against him: *Id.*, sec. 456. If cause is shown, the entry should show what it was and what disposition was made of it by the Court; and lastly the punishment or sentence imposed by the Court, which should be stated with sufficient certainty to enable the officer to execute it. If it is a judgment of imprisonment, the commencement and duration of the term, and the place of confinement, ought to be stated with certainty, if the commencement is stated at all; otherwise the judgment may be absolutely void. But the better practice is not to fix the commencement of the term, but merely to state its duration and the place of

confinement; *Id.*, sec. 465. So in the case of a judgment of death, the judgment ought not to appoint the day of execution, but leave it to be appointed in the warrant; *Id.*, sec. 466; 2 Bishops Criminal Practice. sec 879.

“But while all this ought regularly and properly to appear in the entry of judgment, it does not follow that the omission of some of them, or any of them, will render the judgment erroneous, much less valid.

“In England, an omission to state that the defendant was asked if he had any legal cause to show against the judgment, would be fatal on writ of error: *I Chit. Crim. Law*, 801. In the United States this question has been decided in various ways—some Courts holding that it would be error and others that it would not, even in capital offenses: *Crady v. State*, 11 Ga. 253; *Sarah v. State*, 28 *Id.* 576; *West v. State*, 22 N. J. L. 212; *State v. Ball*, 27 Mo. 324; *Hamilton v. Commonwealth*, 16 Pa. St. 129 (55 Am. Dec. 485); *Safford v. People*, 1 Park, Cr. 474; *Dyson v. State*, 26 Miss. 362; *People v. Stuart*, 4 Cal. 218. But I have been unable to find a single case, in England or America, where such an omission has been held sufficient to render the judgment absolutely void.

“Whether this judgment, then, is absolutely void or not is merely a question of jurisdiction. If it appears that the court had jurisdiction of the subject matter and the person of the defendant (it being a court of general jurisdic-

tion, proceeding according to the course of common law), the judgment is not void, however erroneous [65] it may be, unless it is so uncertain in its terms as to be void upon that ground. But no question of the latter character is made in this case. Said Mr. Chief Justice Marshall, in *Ex parte Watkins*, 3 Pet. 202 "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction on the subject." Such is the general rule. Does the statute, by requiring the offense to be stated, change or modify it? But I do not find it necessary, for the purposes of this case, to determine whether by reason of this provision of the statute, a judgment which is entirely silent as to the offense would for that reason be null and void; for while the entry in this case does not show the precise offense of which the prisoner was convicted, it shows that he was indicted for the crime of murder, tried and convicted of some offense under or within that indictment. It shows, therefore, a subject matter within the jurisdiction of the court. The only reason why, as I conceive—the judgment should show the offense is, that it may appear that the punishment inflicted is lawful, or in other words, that the court has not exceeded its power in that respect. Now, no conviction could have been had under the indictment in view of which the punishment of imprisonment for ten years

would have been beyond the power of the court to impose. There are only three offenses of which he could have been convicted; murder in the first degree, murder in the second degree, and manslaughter. For either of the last two the court had power to imprison for ten years. If the conviction was for the first, the fact that the court imposed imprisonment instead of death as the punishment would not entitle the prisoner to his discharge. Where the prisoner was sentenced to the penitentiary on conviction for horse stealing for one year, the law requiring a sentence for such offense for a period of not less than three years, the error was held to afford no ground for discharge on *habeas corpus*: *Ex parte Shaw* 7 Ohio St. 81 (70 Am. Dec. 55). The Court said: 'The question is one simply of jurisdiction. The court had jurisdiction over the offense and its punishment, and while in the legitimate exercise of its power committed a manifest error and mistake in the award of the number of years of imprisonment. The sentence was not void, but erroneous.' Hence we have a case over which the court in any event had jurisdiction, and which it had not in any event exceeded its powers.

"In *People v. Cavanagh*, 2 Park. Cr. 660, the judgment showed that there had been a conviction for misdemeanor, without stating the particular offense, and called for an imprisonment for the period of thirty days. The stat-

ute in New York in relation to the substance of a judgment entry is the same as ours. On *habeas corpus* the Supreme Court held that the judgment was sufficient to hold the prisoner, on the ground that it showed a case within the jurisdiction of the court in which imprisonment for thirty days could be lawfully imposed, notwithstanding the precise offense for which he was convicted was not stated." [66]

In Pointer v. the United States, the Supreme Court of the United States, speaking through Justice Harlan on this point, says:

"The specific objection to the sentence is that it does not state the offense of which the defendant was found guilty, or that the defendant was guilty of any named crime. This objection is technical rather than substantial. The record of the trial preceding the sentence shows an indictment return to the court by grand jurors duly selected, empanelled, sworn and charged. * * * The indictment itself is given and it appears that the defendant was brought into court upon it; that he was tried upon the same indictment before a petit jury lawfully empanelled and sworn, and that a verdict of guilty as charged * * * was received and incorporated into the record of the trial. When, therefore, the defendant was brought into court and asked what he had to say 'why the sentence of law upon the verdict of guilty heretofore returned against him by the jury * * * should not be pronounced against him' all doubt

as to the offense of which he was found guilty and on account of which he was sentenced, is removed. The sentence itself is in the record and the record shows everything necessary to justify the punishment inflicted. While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good and the sentence itself ‘all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another.’”

For this reason, the objection last stated is not sustained. In the instant case the record shows that the petitioner was complained of for having in his possession, on December 1, 1921, intoxicating liquor, to wit, moonshine whiskey; that he was arrested and brought before the justice, pleaded not guilty, was tried by a jury, convicted and sentenced. The record is clear as to the crime of which he is charged and for which he was sentenced; and under the decision of the Supreme Court and the cases cited, it appears to me that the objection of counsel for petitioner to the sentence is no ground for his discharge on this writ.

The further ground is asserted by counsel that the judgment is void as being in excess of the jurisdiction of the justice. This objection is not tenable as being a ground for discharge. [67] It will be noted that the number of days, imprisonment set forth in the sentence is three hundred. The fine is 600. The statute fixes imprisonment at one day

for each two dollars of the fine. (See Sec. 192, Criminal Code).

Sec. 2299, Compiled Laws of Alaska, provides:

“That a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent therefor, the judgment to pay the fine shall operate to authorize and require the imprisonment until the fine is satisfied at the rate above-mentioned.”

Under this sentence, imprisonment for the costs is not provided for.

As for the contention that the jurisdiction of the justice extends to only one year's imprisonment, I fail to find that our statute so provides. The jurisdiction of a justice is set forth in Sec. 2519, Compiled Laws of Alaska. I can find no more conclusive authority on this point than *Ex parte Lang*, 85 U. S. 163. In this case the statute provided that the penalty for the offense of which the petitioner was convicted was a fine or imprisonment, but the Court, in the first instance, imposed a sentence of fine and imprisonment. As to this judgment the Supreme Court, through that eminent jurist, Justice Miller, says:

“The first judgment, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and

of the offense on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute when it had only the alternative of one of them, did not make the judgment wholly void."

In the matter of the *habeas corpus* proceedings before the Supreme Court, in the case *In re Bonner*, the error or excess [68] of jurisdiction of the Court in imposing sentence, is gone into by Judge Field in a very instructive opinion, and therein the Court says:

"Where the Court is authorized to impose imprisonment and exceeds the time prescribed by law, the judgment is void for the excess."

In the case before us the judgment is not void, but may be void as to any excess, and the present time is not subject to collateral attack under a writ of *habeas corpus*. If the justice has jurisdiction to sentence the defendant for a year only, including the fine under the statutory calculation, the judgment would be void only as to the excess.

See Sec. 2299 and the proviso to Sec. 2301.

Compiled Laws of Alaska, and

Booth v. The U. S., 197 Fed. 287.

I am unable to see that the defendant is illegally restrained of his liberty by the United States Marshal for the reasons stated, and therefor the writ will be discharged and the petitioner remanded to the custody of the marshal for execution of the sentence of the Court.

THOS. M. REED,
Judge.

Delivered April 3, 1922.

Filed in the District Court, District of Alaska,
First Division. Apr. 7, 1922. John H. Dunn,
Clerk. By W. B. King, Deputy. [69]

[Caption and Title.]

No. 2169—A.

Petition for Appeal.

Harry Mabry, the petitioner and appellant above named, feeling himself aggrieved by the decision and final judgment given and entered on this 3d day of April, 1922, in the above-entitled cause, discharging the writ of habeas corpus and remanding the petitioner and appellant to custody and imprisonment under the pretended judgments of said Justice Court of the date of January, 9th, 1922, and of this District Court of the date of March 16th, 1922, as fully set out in the Return of the United States Marshal to the writ of habeas corpus in this case, does hereby appeal from said final judgment of this court, and from every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his said appeal be allowed, and further prays that the bill of exceptions prepared and offered by him may be settled and allowed by this court.

HARRY MABRY,

Petitioner and Appellant.

WICKERSHAM & KEHOE,

Attorneys for Appellant.

Now, on this 5th day of April, 1922, the foregoing appeal is hereby allowed.

Done in open court this 5th day of April, 1922.

THOS. M. REED,

District Judge.

Filed in the District Court, District of Alaska,
First Division. Apr. 5, 1922. J. H. Dunn, Clerk.
By_____, Deputy.

Service of a full, true and correct copy of the
within Petition for Appeal is hereby acknowledged
this 4th day of April, 1922.

GEO. D. BEAUMONT,

U. S. Marshal. [70]

[Caption and Title.]

No. 2169—A.

Assignment of Errors.

Comes now Harry Mabry, the appellant herein,
and makes and files the following assignment of
errors upon which he will rely in prosecuting his
appeal in the above-entitled action;

I.

The Court erred in discharging the writ of
habeas corpus and in making the order remanding
this appellant to restraint and imprisonment as
therein set out.

II.

The Court erred in holding the complaint in this
case made by the Special Assistant U. S. Attorney

on January 9th, 1922, before the Justice Court at Sitka, Alaska and upon which this appellant was arrested, was sufficient or any authority to confer any jurisdiction on said Justice of the Peace to issue any warrant for the arrest of the appellant, or to put him on trial for any offense against the Act of Congress approved Feb. 14, 1917, entitled "An Act to prohibit the manufacture or sale of alcholic liquors in the Territory of Alaska, and for other purposes," or to render the, or any, judgment against the appellant under any charge for a violation of said Act of Congress or to order his imprisonment in any jail or any place, or to make the pretended judgment of January 9th, 1922, so pretended to be made by said Justice in this case. [71]

III.

The Court erred in holding that said complaint states any crime under said Act of Congress, or gave said Justice or District Court any jurisdiction over the person of this appellant; that said complaint does not state any probable cause on sworn information.

IV.

The Court erred in adjudging that the Justice Court in Sitka Precinct, First Division, Alaska, had jurisdiction to make the pretended judgment of January 9th, 1922, and the docket judgment of the same date therein, because it appears upon the face of said judgments, and each of them, that it was null and void for want of jurisdiction in said Justice Court to make and enter the same.

V.

The Court erred in holding that the pretended judgments set out in full in the return of the United States Marshal, defendant, in this case, as his warrant and authority for restraining and imprisoning this appellant as herein complained of, were either or both sufficient and valid, or any legal authority to the said Marshal so to restrain this appellant of his liberty or to imprison him in said jail at Juneau, Alaska, or any where, or at all.

VI.

The Court erred in adjudging that the imprisonment of this appellant by the said United States Marshal defendant herein, upon the said pretended authority set out by him in his return in this case to the writ of habeas corpus, was legal, and that the proceedings in said Justice Court whereby the said judgments were so made, were legal and in compliance with law, because it appears upon the face of the petition in this case, the writ, the return to the writ, and upon the whole record before the court: (1) That the said R. W. DeArmond, Commissioner and *Ex-officio* Justice of the Peace in said Sitka precinct, First [72] Division, Alaska, as aforesaid, had no jurisdiction or authority in law or otherwise, to render and make the pretended judgment so by him made and rendered in this case against the appellant on said January 9th, 1922, as aforesaid, because the said judgment is not based upon any crime defined by or known to the laws of the United States, or the Territory of Alaska, and

the pretended crime stated therein is not a crime known to or defined by said or any laws. (2) Said pretended judgment of January 9th, 1922, as aforesaid, being void for want of jurisdiction, and being so made in excess and outside of the jurisdiction of the said Justice Court, as aforesaid, all subsequent proceedings of said Justice Court, and of the District Court, based thereon, were each without jurisdiction and wholly void. (3) Said pretended judgment of January 9th, 1922, as aforesaid, being void for want of and in excess of the jurisdiction of the said Justice Court, all subsequent proceedings thereunder, both in said Justice Court and in this District Court, and the imprisonment and restraint of this appellant were and now are in violation of law and of this appellant's rights under the Fifth Amendment to the Constitution of the United States. (4) The complaint in said case against this appellant, made and verified on said 9th day of January, 1922, by H. D. Stabler, Special Assistant U. S. Attorney, was so made in violation of the provisions of Section 28 and other provisions of the Act of Congress entitled "An act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," approved Feb. 14, 1917, 39 Stat. L., page 903, and was made without authority of law and in violation of said law and did not state facts sufficient to constitute any crime, or to give the said Justice Court jurisdiction to try and sentence this appellant as in said record stated. (5) That the pretended warrant so issued [73] by the

said Commissioner and *Ex-officio* Justice of the Peace in the Sitka Precinct, as aforesaid, on said January 9th, 1922, for the arrest of this appellant and upon which he was so arrested and restrained of his liberty, and so attempted to be brought within the jurisdiction of the said Justice Court, was and is void and illegal in this: that it is in direct violation of Section 2384, compiled Laws of Alaska, 1913, because it did not and does not now state or designate any crime therein alleged to have been committed by this appellant, and because the said Deputy Marshal had no authority thereby to arrest or to detain or imprison this appellant, and his said arrest and imprisonment thereunder and his detention in said court were illegal because said warrant was void and in violation of law. (6) That the pretended verdict rendered by the jury against this appellant in said Justice Court was and is null and void because it does not find the defendant guilty of any crime, and the same did not afford any jurisdiction to the pretended judgment and sentence so entered by the said Justice of the Peace thereon. (7) Because the pretended judgment so entered by the said Justice of the Peace in the case against this appellant, as aforesaid, was null and void for the further reason that it provided that this appellant should be imprisoned in the jail at Sitka until the costs of said case were paid; and that part of the said pretended judgment providing for his said imprisonment for costs has been imposed upon this appellant and the said judgment is wholly null and void for that reason

also. (8) Because the docket entries in the case against the appellant herein kept by the said Justice of the Peace and made a part of his petition show that the pretended crime charged against appellant and upon which the jury so returned said verdict, and the Justice so rendered said pretended judgment and sentence, was not a crime, and that the said Court had no jurisdiction to render any judgment and sentence against this appellant thereon [74] or at all. (9) Because it appears on the face of the pretended judgment aforesaid, entered by Justice in said Justice Court on January 9th, 1922, against appellant that said Justice had no jurisdiction or authority to sentence appellant to be imprisoned in jail four months, and an additional 300 days, as therein stated, because said periods exceed the jurisdiction of said Justice of the Peace to impose imprisonment, and said sentence was null and void. (10) Because it appears on the face of the order of the District Court in this case dismissing appellant's appeal from the said Justice Court to the said District Court, as herein described, was without authority of law, and the affirmance of the said pretended judgment of the said Justice of the Peace of January 9th, 1922, as aforesaid, was without jurisdiction and void, and all proceedings and orders entered in said cause in said District Court, as aforesaid, were null and void and without jurisdiction. (11) That the order of said District Court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this appellant was in

excess of the jurisdiction of the said District Court and its Judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without the jurisdiction and is null and void. (12) That the pretended imprisonment of this appellant under said pretended judgment of January 9th, 1922, and the said pretended bench-warrant so issued by said District Court upon which this appellant was so arrested on March 24th, 1922, and is now imprisoned, was and is illegal and without jurisdiction or authority of law, and the said United States Marshal, defendant herein, is wholly without authority of law in restraining this appellant and imprisoning him as aforesaid. [75]

WHEREFORE the appellant, Harry Mabry, prays that the final judgment herein be reversed and that this Court shall grant the relief prayed for in appellant's Petition for Writ of Habeas Corpus, now before the Court.

JAMES WICKERSHAM,
J. W. KEHOE,
Attorneys for Appellant.

Filed in the District Court, District of Alaska, First Division. Apr. 5, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [76]

[Caption and Title.]

No. 2169—A.

Objections of United States Attorney to Appeal.

Comes now Arthur G. Shoup, United States Attorney, First Division, District of Alaska, to oppose the motion of said Harry Mabry, above-named appellant, that he be permitted to give a supersedeas bond for his release pending the appeal in this case, and for grounds of such opposition does file the following specifications:

First. This Court is without jurisdiction or authority to issue a bond for the release of said prisoner pending this appeal.

Second. No probable cause exists for grounds for said appeal.

Third. The affidavit filed with said motion for the purpose of showing good cause for such action is irrelevant and immaterial and sets up a collateral allegation not involved in or pertinent to said motion or said appeal, and should be stricken from the files herein.

Fourth. If it is within the authority of this Court to issue an order releasing said appellant on said bond, which said United States Attorney denies, the said bond should run to the United State as beneficiary and not to George D. Beaumont, United States Marshal, as the form submitted provides.

Said Arthur G. Shoup, further appearing, objects to specification numbered 11 in Assignment

numbered VI, said specification numbered 11 being in words and figures as follows: [77]

“(11) That the order of said District Court so made on March, 16th, 1922, directing the issuance of a bench-warrant for the arrest and imprisonment of this appellant was in excess of the jurisdiction of the said District Court and its Judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without the jurisdiction and is null and void.” and to specification numbered 12 in said assignment of error, the same being in words and figures as follows:

“(12) That the pretended imprisonment of this appellant under said pretended judgment of January 9th, 1922, and the said pretended bench-warrant so issued by said District Court upon which this appellant was so arrested on March 24th, 1922, and is now imprisoned, was and is illegal and without jurisdiction or authority of law, and the said United States Marshal, defendant herein, is wholly without authority of law in restraining this appellant and imprisoning him as aforesaid.”

for the reason that said specifications numbered 11 and 12 set up matter relating to an alleged bench-warrant and the arrest of said Harry Mabry thereunder, whereas in fact, as the record in this case reveals, no bench-warrant was ever delivered to the United States Marshal for the arrest of the said Harry Mabry, nor any arrest under such alleged

bench-warrant made as stated in said specifications numbered 11 and 12. Said assignment of error, therefore, sets up allegations that are not facts and do not conform to the record, and therefore should not be allowed.

A. G. SHOUP,
United States Attorney.

Service of copy admitted the 4th day of April, 1922.

J. W. KEHOE,
Of Attys. for Plff.

Filed in the District Court, District of Alaska, First Division. Apr. 4, 1922. J. H. Dunn, Clerk. By _____, Deputy. [78]

[Caption and Title.]

No. 2169—A.

Citation.

To GEORGE D. BEAUMONT, United States Marshal, Defendant and Appellee, and to ARTHUR G. SHOUP, United States Attorney:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, California, within thirty (30) days from the date hereof pursuant to an order allowing an appeal entered in the Clerk's office of the District Court of the Territory of Alaska, Division

Number One, thereof, at Juneau, in that certain action in which Harry Mabry is plaintiff and appellant, and George D. Beaumont, United States Marshal, as defendant and appellee, to show cause, if any there be, why the final judgment rendered herein against plaintiff and appellant, Harry Mabry, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to him in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and the seal of the District Court for the Territory of Alaska, Division No. One, this 5th day of April, 1922.

[Seal] T. M. REED,
Judge of the District Court for the Territory of
Alaska Div. No. 1, at Juneau.

Attest: JOHN H. DUNN,
Clerk of Said Court.

Filed in the District Court, District of Alaska,
First Division. Apr. 5, 1922. John H. Dunn,
Clerk. By Wm. Guir, Deputy.

Copy of within citation received and due service
thereof acknowledged this 4th day of April, 1922.

GEO. D. BEAUMONT,
United States Marshal, Defendant and Appellee.
[79]

[Caption and Title.]

No. 2169—A.

Motion for Supersedeas Bond.

Comes now Harry Mabry, the plaintiff and appellant in the above-entitled cause, and moves the Court that he be permitted to give a supersedeas bond for his release pending the appeal in this case; and in support of said motion appellant files herewith his affidavit for the purpose of showing good cause for such action.

HARRY MABRY,
By WICKERSHAM & KEHOE,
Attorneys for Appellant.

Copy of the within motion and affidavit and due service thereof is hereby acknowledged this — day of April, 1922.

GEO. D. BEAUMONT.

Filed in the District Court, District of Alaska, First Division. Apr. 5, 1922. J. H. Dunn, Clerk. By _____, Deputy.

Sec. 765, R. S. 1878. Rule 33, Ct. Ct. of App. 9th Ct. [80]

Affidavit of Harry Mabry

Territory of Alaska,
City of Juneau,—ss.

Harry Mabry, being first duly sworn, on oath deposes and says: That he is the appellant named in the foregoing motion for leave to give supersedeas bond on appeal in the above-entitled cause;

that he is of the age of 42 years, and has been a resident of the Territory of Alaska for 22 years; that for 4 years he has been a resident of the town of Sitka, Alaska, and engaged in business there as a restaurant keeper; that he has a valuable business and considerable sums of money invested therein; that he is also indebted to other business men at Sitka for supplies and other goods furnished to him for use in said restaurant; that when affiant took his appeal from the decision of the Justice of the Peace in Sitka Precinct rendered against him he was allowed to give a bail bond for his release in the sum of twelve hundred (\$1200.00) dollars which he was able to do by reason of his good standing and integrity as a business man in the said city of Sitka; that affiant came to Juneau on the 24 day of March, 1922, to attend the term of this court at which he was advised his appeal case would be tried; instead of being allowed to present his case upon the merits the Court dismissed his appeal for the want of a cost bond, and affiant was seized and put into jail without further notice; that affiant had a good defence to the charge against him, and had no doubt when he left Sitka to come to Juneau to attend said Court that he would be found not guilty upon said trial, and so left his business in Sitka under charge of a person engaged temporarily for a few days for that purpose; that this affiant's said business must be attended to at once by affiant in person or the whole of said business will be lost, and those to whom affiant owes money will also lose the same; that affiant has never been

convicted of a crime prior to this offense and his offense in this case is said to be based on taking a drink of liquor with friends in a private home; that it is *bona fide* the intention of the affiant to prosecute his appeal in this case to the Circuit Court of Appeals for the Ninth Circuit, and that affiant must [81] in the meantime close up his business and protect the interests of his creditors and that he can only do so upon being allowed to give a bail bond in this case and give his personal attention thereto.

HARRY MABRY.

Subscribed and sworn to before me this 4th day of April, 1922.

[Notarial Seal]

J. W. KEHOE,

Notary Public for Alaska.

My commission expires Sept. 15, 1925. [82]

[Caption and Title.]

No. 2169—A.

Order Fixing Amount of Cost and Supersedeas Bond

This cause came on duly to be heard before the above-entitled Court at Juneau, Alaska, on the 4 day of April, 1922, upon the application of the above-named plaintiff and appellant to have the Court fix the cost and supersedeas bond on appeal in the above-entitled cause, and the Court having heard counsel, and being advised—

IT IS HEREBY ORDERED that the said cost and supersedeas bond be and the same is hereby fixed in this case on the appeal from the final judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit at the sum of Two Thousand Dollars.

Done in open court this 5th day of April, 1922.

THOS. M. REED,
District Judge.

Filed in the District Court, District of Alaska, First Division. Apr. 5, 1922. John H. Dunn, Clerk. By _____, Deputy.

Entered Court Journal No. R, page 135. [83]

[Caption and Title.]

No. 2169—A.

Order Allowing Appeal, etc.

And now, to wit, on the fifth day of April, 1922, it is ORDERED that the appeal be allowed as prayed for.

And it is further ORDERED that said plaintiff and appellant, Harry Mabry, may, at any time pending said appeal, be enlarged upon executing a recognizance, with sureties in the sum of Two Thousand Dollars, to the satisfaction of the Clerk of this court, for his appearance to answer the judgment of the Court of Appeals, and upon failure thereof to give bail, to remain in the custody of the United States Marshal, First Division, Territory of Alaska, at Juneau.

Dated this 5th day of April, 1922.

THOS. M. REED,

Judge.

Due and timely service of the copy of the foregoing order is hereby acknowledged this 5th day of April, 1922.

A. G. SHOUP,

United States Attorney.

Filed in the District Court, District of Alaska, First Division. Apr. 5, 1922. J. H. Dunn, Clerk. By _____, Deputy.

Entered Court Journal No. R, page 135. [84]

[Caption and Title.]

No. 2169—A.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Harry Mabry, Plaintiff, and Lockie McKinnon and Abner Murray, sureties, are held and firmly bound unto the above-named appellee, George D. Beaumont, United States Marshal, in the sum of Two Thousand Dollars (\$2000.00), for the payment of which to be well and truly made, we bind ourselves, and each of our heirs, executors and assigns, firmly by these presents. The condition of this obligation is such that

WHEREAS, the above-bounden Harry Mabry, has appealed to the Circuit Court of Appeals for the Ninth Circuit from judgment rendered against

him in the District Court for Division Number One, at Juneau, District of Alaska, on the 3d day of April, 1922, in that certain cause in which Harry Mabry is plaintiff and the said George D. Beaumont, United States Marshal, is defendant, discharging the writ of habeas corpus therein and remanding the above appellant, plaintiff below, to the custody of him, the said defendant, and whereas the above-named appellant has been ordered enlarged upon recognizance in the sum of Two Thousand Dollars (\$2000.00);

NOW, THEREFORE, if the appellant shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good and shall answer the judgment of the above-entitled Court, this obligation shall be null and void; otherwise to remain in full force and effect. [85]

IN WITNESS WHEREOF, We have have hereunto set our hands and seals this 5th day of April, 1922.

HARRY MABRY, (Seal)

Principal.

LOCKIE McKINNON, (Seal)

Surety.

ABNER MURRAY, (Seal)

Surety.

United States of America,
District of Alaska,—ss.

Lockie McKinnon and Abner Murray, being first duly sworn, depose and say, each for themselves and not one for the other; that he is the surety who

executed as such the foregoing bond; that he is not a counsellor or attorney at law, marshal, clerk of any court or other officer of any court; that he is a resident of the Territory of Alaska; that he is worth the sum of \$2000.00, over and above all just debts and liabilities and exclusive of property exempt from execution.

LOCKIE MCKINNON.

[Seal]

ABNER MURRAY.

Subcribed and sworn to before me this 5th day of April, 1922.

JOHN H. DUNN,
Clerk of District Court.

The above and foregoing bond is hereby approved as to form and sufficiency of sureties this 5th day of April, 1922.

THOS. M. REED,
Judge District Court, 1st Division Alaska.

[Endorsed]: Bond. No. 2169—A. Harry Mabry vs. Geo. D. Beaumont, U. S. Marshal.

Filed in the District Court District of Alaska, First Division. Apr. 5, 1922. J. H. Dunn, Clerk. By W. B. King, Deputy. [86]

[Caption and Title.]

No. 2169—A.

Order of Release.

To the United States Marshal, District of Alaska,
Division Number One:

Harry Mabry, who is detained by you upon a

charge of violation of the Alaska Bone Dry Law, having perfected an appeal in the above-entitled matter from the final order of this Court dismissing his petition for writ of habeas corpus, and having given sufficient bail to prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good and to answer the judgment of the above-entitled Court and of the Circuit Court of Appeals for the Ninth Circuit and having been enlarged upon said bail, you are commanded forthwith to discharge him from your custody.

Dated at Juneau this 5th day of April, 1922.

THOS. M. REED,
Judge.

Copy received this 5th day of April, 1922.

A. G. SHOUP,
U. S. Atty.

Entered Court Journal No. R, page 136.

Filed in the District Court, District of Alaska,
First Division, Apr. 5, 1922. John H. Dunn, Clerk.
By L. E. Spray, Deputy. [87]

[Caption and Title.]

No. 2169—A.

Cost Bill.

Statement of disbursements claimed in the above-entitled cause, viz:

Clerk's Fees	\$15.25
Marshal's Fees	\$ none
Trial Fee	\$
Costs in Lower Court	\$
Advertising	\$
Depositions	\$
Attorneys' Fees	\$
Attorney's Fee for taking — depositions, at — each	\$
Master's Fees	\$
Referee's Fee	\$
Disbursements	\$
Witness Fees	\$
Total	\$15.25

Filed in the District Court, District of Alaska,
First Division. Apr. 10, 1922. John H. Dunn,
Clerk. By W. B. King, Deputy.

United States of America,
Territory of Alaska,
Division No. 1,—ss.

I, H. D. Stabler being duly sworn, say I am the Sp. Asst. U. S. Attorney, for defendant U. S. Marshal in the above-entitled cause; that the costs and disbursements set forth above have been necessarily

incurred in the prosecution of this suit, and that defendant is entitled to recover the same from the plaintiff-petitioner.

H. D. STABLER,
For Defendant George D. Beaumont.

Subscribed and sworn to before me, this April 10, 1922.

[Seal]

JOHN H. DUNN,
Clerk.

By Walter B. King,
Deputy Clerk.

Costs taxed at \$15.25 this 10th day of April, 1922.

JOHN H. DUNN,
Clerk. [88]

[Caption and Title.]

No. 2169—A.

Stipulation Re Printing Transcript of Record.

It is stipulated between the attorneys for the parties respectively, that in printing the record in this case for use in the United States Circuit Court of Appeals for the Ninth Circuit, all captions should be omitted after the title of the cause has been once printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor. All other parts of the record should be printed.

Dated this 11th day of April, 1922.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff and Appellant.
A. G. SHOUP,
U. S. Attorney for Defendant and Appellee.

Filed in the District Court, District of Alaska,
First Division. Apr. 11, 1922. John H. Dunn,
Clerk. By L. E. Spray, Deputy. [89]

[Caption and Title.]

No 2169—A.

Praecipe for Transcript of Record.

To the Clerk of the District Court for the Territory
of Alaska, Division Number One.

You will kindly prepare and transmit to the
Circuit Court of Appeals for the Ninth Circuit in
connection with the appeal herein copies of the fol-
lowing papers and documents herein:

1. Petition for writ of habeas corpus, with at-
tached papers.
2. Order granting writ of habeas corpus.
3. Writ of habeas corpus.
4. Return to writ of habeas corpus.
5. Order discharging writ of habeas corpus.
6. Bill of exceptions.
7. Memo opinion on petition for writ of habeas
corpus.
8. Petition for appeal.
9. Assignment of errors.

10. Objections of U. S. Attorney to appeal.
11. Citation.
12. Motion for supersedeas bond, affidavit attached.
13. Order fixing bond.
14. Order enlarging defendant (petitioner).
15. Bond.
16. Order of release.
17. Cost bill.
18. Stipulation.
19. This praecipe.

Due and timely service of a full, true and correct copy of the within praecipe hereby acknowledged this 11th day of April, 1922.

A. G. SHOUP,
U. S. Atty.

Filed in the District Court, District of Alaska, First Division. Apr. 11, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy.

WICKERSHAM & KEHOE,
Attorneys for Plaintiff & Appellant. [90]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

United States of America,
District of Alaska,
Divison No. 1,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, John H. Dunn, Clerk of the District Court of Alaska, Division No. 1, hereby certify that the fore-

going and hereto attached ninety pages of type-written matter, numbered from one to ninety, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorneys for plaintiff and appellant on file in my office and made a part hereof, in Cause No. 2169-A, wherein Harry Mabry is plaintiff and appellant and George D. Beaumont, United States Marshal, is defendant and appellee.

I further certify, that the said record is by virtue of the petition on appeal and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificates, amounting to (\$43.35) forty-three and 35/100 dollars, has been paid to me by counsel for appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the above-entitled court this 13th day of April, 1922.

[Seal]

JOHN H. DUNN,
Clerk.

By L. E. Spray,
Deputy.

[Endorsed]: No. 3866. United States Circuit Court of Appeals for the Ninth Circuit. Harry Mabry, Appellant, vs. George D. Beaumont, as

United States Marshal, for the Territory of Alaska,
First Division, Appellee. Transcript of Record.
Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

Filed April 25, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3866.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY MABRY,
Appellant,
vs.
GEORGE D. BEAUMONT, as
United States Marshal,
Appellee.

APPLICATION FOR HABEAS CORPUS.

Brief and Argument for Appellant

WICKERSHAM & KEHOE,
Attorneys for Appellant.
Juneau, Alaska.

FILED

DEC 26 1922

U. S. DISTRICT COURT

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY MABRY,
Appellant,
vs.
GEORGE D. BEAUMONT, as
United States Marshal,
Appellee.

APPLICATION FOR HABEAS CORPUS.

Brief and Argument for Appellant

WICKERSHAM & KEHOE,
Attorneys for Appellant.
Juneau, Alaska.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY MABRY, }
Appellant,
vs.
GEORGE D. BEAUMONT, as }
United States Marshal,
Appellee.

APPLICATION FOR HABEAS CORPUS.

Brief and Argument for Appellant

STATEMENT OF THE CASE

The appellant was accused of "a violation of the Alaska Bone Dry Act, Pub. No. 308," by taking a drink of "moonshine whiskey" with some friends, in S. S. Thornton's residence, at Sitka, Alaska, on December 1, 1921; on complaint of the Ass't U. S. Attorney, at Sitka, Alaska, he was arrested, tried before a jury, found guilty and sentenced to Four (4) months imprisonment in the jail at Sitka, and to pay a fine of Six Hundred (\$600.00) dollars, and costs amounting to Ninety-Three and 55-100

(\$93.55) dollars, and to be confined in jail till the fine and costs are paid.

The record shows it was his first conviction. After a futile attempt to secure an appeal to the district court, defendant applied to the district court for the First Division, at Juneau, Alaska, in a habeas corpus proceeding, praying to be discharged from confinement because the justice who tried and sentenced him had no jurisdiction to cause his arrest and trial, and because the judgment entered is void for want of jurisdiction.

On the motion to dismiss his attempted appeal from the justice court the judge of the district court entered an order affirming the judgment and sentence in the justice court; appellant objects to that affirmation as also void for want of jurisdiction, because all the proceedings in the justice court upon which it is based, being void for want of jurisdiction, there was no jurisdictional basis for affirmance.

The appellant will rely upon the following errors assigned by him in this case:

I.

The court erred in discharging the writ of habeas corpus and in making the order remanding this appellant to restraint and imprisonment as therein set out.

II.

The court erred in holding the complaint in this case made by the special assistant U. S. attorney on January 9th, 1922, before the justice court at Sitka, Alaska, and upon which this appellant was arrested, was sufficient or any authority to confer any jurisdiction on said justice of the peace to issue

any warrant for the arrest of the appellant, or to put him on trial for any offense against the act of Congress approved Feb. 14, 1917, entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," or to render the, or any, judgment against the appellant under any charge for a violation of said act of Congress, or to order his imprisonment in any jail or any place, or to make the pretended judgment of January 9th, 1922, so pretended to be made by said justice in this case.

III.

The court erred in holding that said complaint states any crime under said act of Congress, or gave said justice or district court any jurisdiction over the person of this appellant; that said complaint does not state any probable cause on sworn information.

IV.

The court erred in adjudging that that justice court in Sitka precinct, first division, Alaska, had jurisdiction to make the pretended judgment of January 9th, 1922, and the docket judgment of the same date therein, because it appears upon the face of said judgments, and each of them, that it was null and void for want of jurisdiction in said justice court to make and enter the same.

V.

The court erred in holding that the pretended judgments set out in full in the return of the United States Marshal, defendant, in this case, as his warrant and authority for restraining and imprisoning this appellant, as herein complained of, were either

or both sufficient and valid, or any legal authority to the said Marshal so to restrain this appellant of his liberty or to imprison him in said jail at Juneau, Alaska, or any where, or at all.

VI.

The court erred in adjudging that the imprisonment of this appellant by the said United States Marshal, defendant herein, upon the said pretended authority set out by him in his return in this case to the writ of habeas corpus, was legal, and that the proceedings in said justice court whereby the said judgments were so made, were legal and in compliance with law, because it appears upon the face of the petition in this case, the writ, the return of the writ, and upon the whole record before the court:

- (1) That the said R. W. DeArmond, Commissioner and ex-officio justice of the peace in said Sitka precinct, first division, Alaska, as aforesaid, had no jurisdiction or authority in law or otherwise, to render and make the pretended judgment so by him made and rendered in this case against the appellant on said January 9th, 1922, as aforesaid, because the said judgment is not based upon any crime defined by or known to the laws of the United States, or the Territory of Alaska, and the pretended crime stated therein is not a crime known to or defined by said or any laws.
- (2) Said pretended judgment of January 9th, 1922, as aforesaid, being void for want of jurisdiction, and being so made in excess and outside of the jurisdiction of the said justice court, as aforesaid, all subsequent proceedings of said justice court, and of the district court, based thereon, were each without jurisdiction and wholly void.
- (3) Said pretended

judgment of January 9th, 1922, as aforesaid, being void for want of and in excess of the jurisdiction of the said justice court, all subsequent proceedings thereunder, both in said justice court and in this district court, and the imprisonment and restraint of this appellant were and now are in violation of law and of this appellant's rights under the Fifth Amendment to the Constitution of the United States. (4) The complaint in said case against this appellant, made and verified on said 9th day of January, 1922, by H. D. Stabler, special assistant U. S. attorney, was so made in violation of the provisions of Section 28 and other provisions of the act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," approved Feb. 14, 1917, 39 Stat. L. page 903, and was made without authority of law and in violation of said law and did not state facts sufficient to constitute any crime, or to give the said justice court jurisdiction to try and sentence this appellant as in said record stated. (5) That the pretended warrant so issued by the said Commissioner and ex-officio justice of the peace in the Sitka precinct, as aforesaid, on said January 9th, 1922, for the arrest of this appellant and upon which he was so arrested and restrained of his liberty, and so attempted to be brought within the jurisdiction of the said justice court, was and is void and illegal in this: that it is in direct violation of Section 2384, Compiled Laws of Alaska, 1913, because it did not and does not now state or designate any crime therein alleged to have been committed by this appellant, and because the said deputy marshal

had no authority to thereby arrest or to detain or imprison this appellant, and his said arrest and imprisonment thereunder and his detention in said court were illegal because said warrant was void and in violation of law. (6) That the pretended verdict rendered by the jury against this appellant in said justice court was and is null and void because it does not find the defendant guilty of any crime, and the same did not afford any jurisdiction to the pretended judgment and sentence so entered by the said justice of the peace thereon. (7) Because the pretended judgment so entered by the said justice of the peace in the case against this appellant, as aforesaid, was null and void for the further reason that it provided that this appellant should be imprisoned in jail at Sitka until the costs of said case were paid; and that part of the said pretended judgment providing for his said imprisonment for costs has been imposed upon this appellant and the said judgment is wholly null and void for that reason also. (8) Because the docket entries in the case against the appellant herein kept by the said justice of the peace and made a part of his petition show that the pretended crime charged against appellant and upon which the jury so returned said verdict, and the justice so rendered said pretended judgment and sentence, was not a crime, and that the said court had no jurisdiction to render any judgment and sentence against this appellant thereon or at all. (9.) Because it appears on the face of the pretended judgment aforesaid, entered by the justice in said justice court on January 9th, 1922, against appellant that said justice had no jurisdiction

tion or authority to sentence appellant to be imprisoned in jail four months, and an additional 300 days, as therein stated, because said periods exceed the jurisdiction of said justice of the peace to impose imprisonment, and said sentence was null and void.

(10) Because it appears on the face of the order of the district court in this case dismissing appellant's appeal from the said justice court to the said district court, as herein described, was without authority of law, and the affirmance of the said pretended judgment of the said justice of the peace of January 9th, 1922, as aforesaid, was without jurisdiction and void, and all proceedings and orders entered in said cause in said district court, as aforesaid, were null and void and without jurisdiction. (11) That the order of said district court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this appellant was in excess of the jurisdiction of the said district court and its judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without jurisdiction and is null and void. (12) That the pretended imprisonment of this appellant under said pretended judgment of January 9th, 1922, and the said pretended bench warrant so issued by said district court upon which this appellant was so arrested on March 24th, 1922, and is now imprisoned, was and is illegal and without jurisdiction or authority of law, and the said United States Marshal, defendant herein, is wholly without authority of law in restraining this appellant and imprisoning him as aforesaid.

POINTS AND AUTHORITIES

1. Alaska Statutes re Habeas Corpus.

Citations to Chapter 57, Compiled Laws of Alaska, 1913, p 537.

“Sec. 1398. Every person imprisoned, or otherwise restrained of his liberty, within the district, under any pretence whatsoever, except in the cases specified in the next section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

“Sec. 1399. Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, shall not be allowed to prosecute the writ.

“Sec. 1410. The court or judge before whom the party shall be brought on such writ shall, immediately after the return thereof, proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not.

“Sec. 1411. If no legal cause be shown for such imprisonment or restraint, or for the continuation thereof, the court or judge shall discharge such party from the custody or restraint under which he is held.

“Sec. 1412. It shall be the duty of the court or

judge forthwith to remand such party if it shall appear that he is legally detained in custody.

“Sec. 1413. If it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner shall be discharged in either of the following cases:

First. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

Second. When, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterwards the party has become entitled to be discharged;

Third. When the order or process is defective in some matter of substance required by law, rendering such process void;

Fourth. When the order or process, though in proper form, has been issued in a case not allowed by law;

Fifth. When the person having the custody of the prisoner under such order or process is not the person empowered by law to detain him; or,

Sixth. When the order or process is not authorized by any judgment of any court nor by any provision of law.

“Sec. 1422. If it appear that the party detained is illegally imprisoned or restrained, judgment shall be given that he be forthwith discharged; otherwise judgment shall be given that the proceeding be dismissed and the party remanded.

2. Habeas Corpus a Statutory Remedy.

In *Ex parte Siebold*, 100 U. S. 371; 25 L. Ed. 717, the court said:

“The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such other court over the person or the cause, or some other matter rendering its proceedings void.”

The power and authority to issue the writ of habeas corpus in the states is generally provided by the constitution or the laws of each particular state, and the manner of the exercise of such power is also generally the subject of legislative grant.

Bailey on Habeas Corpus. Vol. 1, Sec. 26.

The Alaskan statutes on habeas corpus were enacted by Congress in the code of civil procedure by the Act of June 6, 1900, 31 Stat. L. 423; by the subsequent act of Congress of August 24, 1912, creating the Alaska Legislature and conferring power to legislate. This latter body was given the power to alter, amend, modify or repeal those and all other sections in the codes of Alaska (Sec. 410, Comp. Laws of Alaska, 1913). Those sections are, therefore, Territorial statutes.

In addition to these Territorial statutes granting relief in habeas corpus proceedings, there is another and a different body of statutes in force in Alaska, having the same general purpose as the Alaska statutes, viz: the Chapter Thirteen of the United States Rev. Stat. 1878, being the general statutes of the United States on the subject of habeas corpus.

While the territorial statutes and the general United States statutes establishing the right to the writ of habeas corpus have the same general object in view, the two sets of laws are quite different in phraseology, in application, and in practice. The territorial statutes are broader in their application, are more specific and particular in their details, and contain "some special statutes authorizing" the writ not found in the general statutes of the United States, and, to that extent, it may be, some of the general statements found in the reported decisions of the Supreme Court of the United States do not apply with equal force to cases arising under the territorial laws.

The state constitutions and statutes establishing the right to the writ of habeas corpus differ from each other, and, adding those of the United States and Alaska, there are in the United States fifty such different statutes on the subject, no two of which, generally, are alike.

The federal courts having no common law jurisdiction, derive their power in respect to the writ, from the Constitution of the United States, and the laws passed in pursuance thereof, while the power is inherent in the state courts of original jurisdiction by virtue of the common-law, preserved by the Constitutions of the states.

Bailey on Habeas Corpus, Vol 1, Sec. 1.

So far, then, as Alaska is concerned, the right to the remedy by habeas corpus is to be measured and controlled, in territorial cases, by the statutes of the territory. The judge in the lower court in this case felt bound by the hard and fast rule that the

prisoner should not be discharged except for the absolute want of jurisdiction in the justice's court, and based his holdings on the decisions of the Supreme Court of the United States, under the United States statutes in relation to judgments in superior courts.

In this case, however, it is the judgment and proceedings of a justice of the peace which are attacked, and which are thought to be illegal and void under the statutes of the Territory of Alaska, for, as the Supreme Court said in the Siebold case, there is "some special statute authorizing it."

Being a statutory remedy, then, the right and the remedy are as broad as the "special statute authorizing it." We think the "special statute authorizing it" in Alaska, is broader than the view taken by the trial judge in this case, but we also think the court should have discharged the prisoner under the more limited, even if general, rule, that the justice's court had no authority or power to order the imprisonment of the accused, because that court was wholly without jurisdiction to enter the judgment, and "for other matter rendering its proceedings void", as stated in the Siebold case, *supra*.

3. A Territorial Case.

We are informed by the heading on the complaint made in this case before the justice of the peace in the Sitka precinct, that it is a "Complaint for Violation of the Alaska Bone Dry Act,—Pub. No. 308", and by the opinion of the judge of the district court, that that means a violation of the Act of Congress entitled "An Act to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska,

and for other purposes," approved Feb. 14, 1917, 39 Stat. L. 903, is intended.

Now, this court held in the case of *Abatte v. United States*, 270 Fed. 735: "In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, effects no more the Alaskan act than it does the State acts." In short the court held the "Bone Dry Law" to be a Territorial statute, and, therefore, an application for a writ of habeas corpus to test the legality of a conviction under it will properly arise under the territorial statutes providing that remedy.

This case, then, in every part, arose and is to be tested and determined under the territorial statutes, and not under the United States statutes. It is a Territorial case to be tried on the Territorial side of the court, under Territorial statutes.

4. The Territorial Statutes in Habeas Corpus.

In his memorandum opinion in the case at bar the lower court based his conclusions wholly on the opinions of the Supreme Court of the United States, but those opinions were, in turn, based wholly on the United States statutes, and the general conclusions drawn from the Constitutional clause in Sec. 9, Art. 1.

Query: If in Alaska habeas corpus, like mandamus and other extraordinary writs, is purely a statutory remedy, will the court not determine the question in this case from the reading of the Alaskan statutes rather than from the general principles stated in the United States courts, based on the

United States statutes, or from the Supreme Court of any state in the Union, based on that state's statutes?

We have called particular attention to the statutes of Alaska, quoted in paragraph one above, for the purpose of pointing this court to the various clauses in those sections which accentuate the differences between the habeas corpus remedy in Alaska, and the United States statutes on the same subject, and also the quotations from the decisions of the Supreme Court, so freely made by the trial judge in his memorandum opinion.

We do not wish to be misunderstood: So far as the Territorial statutes are "some special statute authorizing it", we think they are the law of this case and should be followed, but, undoubtedly, the general principles announced by the higher appellate courts of this jurisdiction, in line with the Alaska statutes, and not in violation thereof, are to be followed, and in that regard we shall insist that the appellant is entitled to be discharged, on this record, on those general principles also.

Congress passed "An Act making further provision for a civil Government for Alaska, and for other purposes", on June 6, 1900, 31 Stat. L. 321. The provisions relating to habeas corpus will be found in that volume, in Chapter Fifty-Seven, at pages 423, being identical with Chapter 57 in the Compiled Laws of Alaska, 1913.

Under these statutes if it is shown the process is "illegal", the writ may be granted; the grounds for the discharge of one imprisoned "illegally" are specifically set out in Sec. 581, in Chapter 57, of the

act of Congress, in 31 Stat. L. 425, and in the identical statute in Sec. 1413, Compiled Laws of Alaska, 1913, page 540.

Under the statutory provisions in Chapter 57, in the Alaska code of civil procedure, and in the 31 Stat. L. 423, the writ of habeas corpus will lie in Alaska, and the prisoner be entitled to his discharge, when it shall appear to the court, on the return:

1. That the imprisonment is "illegal", Section 1398.
2. That he is not imprisoned under a "legal process", Section 1399.
3. That no "legal cause shown for imprisonment", Section 1411.
4. When the jurisdiction of such court officer has been exceeded, "either as to matter, place, sum, or person", Section 1413.
5. When "the party has become entitled to be discharged", Section 1413.
6. "When the order or process is defective in some matter of substance required by law, rendering such process void", Section 1413.
7. "When the order or process is not authorized by any judgment of any court, nor by any provision of law", Section 1413.
8. When the party has not "been legally committed for a criminal offense", Section 1415.
9. That "his imprisonment or restraint is unlawful, or that he is entitled to his discharge", Section 1419.
10. When the party detained is illegally imprisoned, Section 1422.

If any one or more of these ten statutory grounds

for discharge shall clearly appear on the face of the return, or the record in the case, it is the duty of the court to discharge the prisoner under the writ.

5. Criminal Jurisdiction of Justice Courts in Alaska.

The return and the record in this case show the appellant was imprisoned under an alleged order or judgment made by the Commissioner as ex-officio justice of the peace in the Sitka precinct, Alaska.

In enacting the penal code of March 3, 1899, for Alaska, Congress created the justice court with its limited jurisdiction as follows:

“Sec. 408. That in addition to the commissioners appointed by the President of the United States in pursuance of acts of Congress now in force, or that may be hereafter enacted, the judge of the district court of said district may appoint commissioners who shall reside at such places as he may designate in the order of appointment and who shall perform the duties and exercise the powers conferred upon justices of the peace by this act.”

Sec. 408, 30 Stat. L. 1330.

Sec. 2517, Compiled Laws of Alaska, 1913.

All justices in Alaska are appointed under that section. The jurisdiction of a justice of the peace in criminal cases is established and limited by the following section:

“Sec. 410. That a justice’s court has jurisdiction of the following crimes:

First. Lacency, where the punishment therefor may be imprisonment in the county jail or by fine.

Second. Assault, or assault and battery, not charged to have been committed with intent to com-

mit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties.

Third. Of any misdemeanor punishable by imprisonment in the county jail, or by fine, or by both."

Section 410, 30 Stat. L. 1330.

Section 2519 Compiled Laws of Alaska, 1913.

The justice's court in Alaska is one of limited and inferior jurisdiction.

6. Justice's Record Must Show Jurisdiction.

The record of a criminal court of limited jurisdiction must show affirmatively such facts as confer jurisdiction, and generally no presumption is indulged in favor thereof.

12 Cyc. page 228, and note 33.

Ex parte Kearney, 55, Cal. 212.

The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts, except that which expressly appears to be so.

11 Cyc. page 693, and note 4.

John v. Marion Co. 4 Ore 46.

Farley v. Parker, 6 Ore 105; 25 Am. Rep. 504.

Northcut v. Lemery, 8 Ore 316.

Ferguson v. Jones, 17 Ore. 204; 20 Pac. 842; 11 Am. St. Rep. 808; 2 L. R. A. 620.

The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evi-

dence or proper averments in the record or their judgments will be deemed void on their face.

Galpin v. Page, 85 U. S. 350, 366; 21 L. Ed. 959, 963.

State v. Simpson, 91 Me. 81; 39 Atl. 287.

Northcut v. Lemery, 8 Ore. 316.

Courts martial are tribunals of special and limited jurisdiction, whose judgments, so far as questions relating to collateral attack are concerned, are always open to collateral attack, and unless facts essential to sustain their jurisdiction appear, it must be held not to exist.

Collins v. McDonald, — U. S. —, Ad. Opinions No. 13, May 15, 1922, page 371.

McClauthry v. Deming, 186 U. S. 49, 62; 46 L. Ed. 1049-55.

Givens v. Zerbst, 255 U. S. 11, 19; 65 L. Ed. 475, 479.

Jurisdiction of inferior courts not of record must be affirmatively shown, and no presumption thereof exists. Freeman, Judgments, 3rd Ed. Sec. 517. They can, therefore, be attacked collaterally. While the writ of habeas corpus cannot be converted into a writ of error, yet, unless the court which tried the prisoner has jurisdiction to try and punish him for the offense, the prisoner may be discharged on such writ. Re. Coy, 127 U. S. 731, 737; 32 L. Ed. 274, 280; 8 Sup. Ct. Rep. 1263.

McClauthry v. Deming, supra.

In the 16 R. C. L. Sec. 41, page 363, Justices of the Peace, the rule is stated thus:

In criminal prosecutions as well as in civil actions a justice of the peace exercises a limited statutory

authority, and he cannot legally go beyond his authority, and if he does so his action will be null and void. Citing Lace v. Hendricks, 164, Ala. 280; 51 So. 157; 137 Am. St. Rep. 45; Bregaglia v. Vineland, 53 N. J. L. 168; 20 Atl. 1082; 10 L. R. A. 407.

7. The Complaint in This Case.

The complaint upon which this case is based is as follows:

(Transcript, page 15.)

"IN THE UNITED STATES COMMISSIONER'S COURT FOR THE SITKA PRECINCT, DISTRICT OF ALASKA, FIRST DIVISION.

UNITED STATES OF AMERICA

vs.

HARRY MABRY, defendant.

Complaint for violation of the Alaska Bone Dry Act.
Pub. No. 308.

Harry Mabry is accused by H. D. Stabler in this complaint of the crime of possessing intoxicating liquor, committed as follows, to-wit: The said Harry Mabry in the District of Alaska, and within the jurisdiction of this court, did wilfully and unlawfully, on the 1st day of December, 1921, at Sitka, Alaska, and in S. S. Thornton's residence near the Russian Greek Church at Sitka, Alaska, then and there have in his possession intoxicating liquor, to-wit, moonshine whiskey, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

H. D. Stabler,
Asst. U. S. Attorney.

United States of America) ss.
Territory of Alaska)

I, H. D. Stabler, being first duly sworn, depose and say that the foregoing complaint is true.

H. D. Stabler.

Subscribed and sworn to before me this 9th day of January, 1922.

(Seal)

R. W. DeArmond.

Ex-Officio Justice of the Peace.

We make the following objections to this complaint:

1. That it is not the "information" required by Section 28 of the Act of Congress entitled "An Act to prohibit the manufacture or sale of intoxicating liquors in the Territory of Alaska, and for other purposes", approved Feb. 14, 1917, 39 Stat. L. 903, and did not give the justice of the peace in Sitka precinct any authority or jurisdiction to issue the warrant of arrest, or to try and render judgment in the case at bar.

2. That the said complaint does not substantially conform to the requirements of chapter seven of title fifteen, of the code of criminal procedure of Alaska, in this:

(a) It does not contain a statement of the facts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

(b) That it is not direct and certain as it regards the crime charged; nor,

(c) The particular circumstances of the crime

charged, being necessary to constitute a complete crime;

(d) That the act charged as the crime is not stated with such a degree of certainty as to enable the court to pronounce judgment, upon conviction, according to the right of the case;

(e) That the facts stated do not constitute a crime.

Chapter 42, code of criminal procedure, Compiled Laws of Alaska, 1913, "Criminal Actions in Justice's Courts," provides the practice in such courts. The first four sections in that chapter relate to the complaint in this case as follows:

"Section 2520. That a criminal action in a justice's court is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner hereinbefore provided, except as in this chapter otherwise specially provided.

"Section 2521. That in a justice's court a criminal action is commenced by the filing of the complaint therein, verified by the oath of the person commencing the action, who is thereafter known as the private prosecutor; and no judgment of conviction or acquittal can be given in a criminal action in justice's court unless the person injured appear or be subpoenaed to attend the trial as a witness.

"Section 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing what is sufficient to be stated in such pleading and the form of stating it.

"Section 2523. That upon the filing of the complaint the justice must issue a warrant of arrest for

the defendant named therein.”

It was under those four sections of the code, and no other sections or law, that the complaint in this action was made and filed, and upon which this case was based in the justice’s court in the Sitka precinct.

8. The Justice Has No Jurisdiction Except by “Information”.

But, Sec. 28 of the act of Congress of Feb. 14, 1917, called the “Alaska Bone Dry Law”, by the district judge in his “memorandum opinion”, provides a special method of beginning criminal actions for its enforcement by “information”.

That section provides as follows:

“Sec. 28. That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and said United States district attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated; and in such prosecutions any one making a false oath to any material fact shall be deemed guilty of perjury.”

And, also, prosecutions for violations of the liquor license provisions of the act of Congress approved June 6, 1900, are found in Chapter 44 of the Alaska code of criminal procedure, Compiled Laws of Alaska, 1913; could only be commenced by “information filed in the district court or any subdivision thereof, or before a United States Commissioner, by the United States marshal or any deputy marshal, or

by the district attorney or by any of his assistants. Or such prosecution may be by and through indictment by grand jury, and it shall be the duty of either of said officers, on the representation of two or more reputable citizens, to file such information, or to present the facts alleged to constitute violations of the law to the Grand Jury."

Sec. 274 Carter's Codes, 1900.

Sec. 2583, Compiled Laws of Alaska, 1913.

In short, Congress has provided for two methods of commencing criminal prosecutions before a justice of the peace in Alaska, and two only, viz:

1. Violations of the liquor laws of 1900, and also of 1917, shall be by "information" filed by a specified public official, either before a justice or a district court.

2. All other criminal prosecutions before a justice of the peace shall be commenced by complaint, under section 2521, supra, by a "private prosecutor", or by an official acting as such.

Assuming, as the judge of the district court did, that the prosecution before the justice of the peace at Sitka was commenced for a violation of the act of Feb. 14, 1917, for having intoxicating liquor in possession by the appellant, it could be lawfully commenced, under Sec. 28 of that Act, supra, only by "information filed by any such officer before a justice of the peace", and not by complaint.

Webster defines "complaint" as an accusation or charge against an offender, made by a private person or an informer to the justice of the peace or other proper officer, alleging that the offender has violated the law, and claiming the penalty due to

the prosecutor. It differs from "information", which is a prosecution of the offender by an attorney or solicitor; from a "presentment" or "indictment", which are accusations of the Grand Jury.

Goddard v. State, 12 Conn. 448, 453.

Even more clearly in Alaska, a "complaint" under section 2521 is the pleading to be used by a "private prosecutor", while under Sec. 28 of the act of Feb. 14, 1917, in prosecutions for violation of the Territorial prohibition law, the prosecution can only be commenced by a public officer, and only by information.

In this case the prosecution was commenced by the "complaint" set out in the record, and since it is jurisdictional, and illegal and in violation of the strict letter of the law, the justice had no jurisdiction under the Alaska Prohibition Act, called the "Alaska Bone Dry Law", under the complaint.

But the district judge in his memorandum opinion, says there is no difference in the necessary charging part of a "complaint" and an "information", and while the private prosecutor in this case called it a "complaint" and the justice called it a "complaint", and section 2521 fixes its legal character as a "complaint", he, the judge, calls it an "information".

And equally it is true there is not, under section 2522, supra, any difference in the charging parts of a "complaint" and an "indictment" for that section says:

"Sec. 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing

what is sufficient to be stated in such pleading and the form of stating it."

But would the court hold that a "complaint" is an "indictment" or vice versa, for that reason?

We think too, the judge of the district court had no right or authority thus to mutilate and misstate the record. There was no evidence offered before him or elsewhere to show any error or mistake of the justice in the character of the pleading. In his order for the summoning the jury the justice declared:

"Whereas there has been a complaint duly sworn to filed in the above entitled court, and the above named defendant having," etc.

(Transcript, page 17)

and in the docket entries he repeated it:

"Complaint made by H. D. Stabler, Asst U. S. Attorney," etc. * * * * *

1922.

Jan. 9, Complaint sworn to and filed," etc.

(Transcript, page 25)

We submit it is perfectly clear on the face of the record that there was no misunderstanding or mistake in regard to the character of the pleading upon which the criminal prosecution was begun before the justice, and the judge of the district court is not justified in declaring it to be an information, for the person signing it and the justice both meant it to be a complaint as it was in law and in fact.

9. The Complaint Did Not State Facts Sufficient to Constitute a Crime.

In an application for habeas corpus by one sen-

tenced by a justice or municipal court, a complaint, or information is examined as critically as upon demurrer, since the legality of the proceedings in such court is not presumed but must be made affirmatively to appear by the record.

Ex parte Goldsworthy (Cal) 134 Pac. 352.

Ex parte Grenall, 153 Cal 767, 770; 96 Pac. 804.

Ex parte Kearney, 55 Cal. 212.

In re Morganstern, 104 Pac. 448.

Ex parte Tobias Watkins, 3 Pet. 193; 7 L. Ed. 650.

Ex parte Bain, 121, U. S. 14; 30 L. E. 849, 853.

Assuming, as the district judge did, that the charge against the appellant was for a violation of the first section of the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903, for having in his possession intoxicating liquor by taking a drink of "moonshine whiskey" in his neighbor's house, that section reads:

"Be it enacted, etc., That on and after the first day of January, 1918, it shall be unlawful for any person * * * to have in his * * * possession * * * any intoxicating liquor * * * unless the same was procured and is so possessed * * * as hereinafter provided."

And Section 14 of that Act repeats as follows:

"Sec. 14. That it shall be unlawful for any person to * * * have in his possession any intoxicating liquors, except as in this Act provided."

The crime defined and denounced in the enacting clause,—the first section of the act, contains two necessary elements or ingredients: First. Having "in his possession any intoxicating liquor"; Second.

Not "so procured and * * * possessed * * as hereinafter provided".

The crime defined and denounced in the 14th section of the act, also contains the same two necessary elements or ingredients. First. Having in his possession intoxicating liquor. Second. "except as in this act provided".

There is no other definition of this crime in this Act.

Section 2150, Chapter seven, of the Code of Crim. Pro., Comp. Laws of Alaska, 1913, provides:

"Sec. 2150. That the indictment must be direct and certain as it regards:

First. The party charged;

Second. The crime charged; and

Third. The particular circumstances of the crime charged, when they are necessary to constitute a complete crime."

And Section 2522, Chapter forty-two, Code of Crim. Pro., Comp. Laws of Alaska, 1913, makes this section applicable to this complaint:

"Sec. 2522. That the complaint is to be deemed an indictment within the meaning of the provisions of chapter seven, title fifteen, of this act, prescribing what is sufficient to be stated in such pleading and the form of stating it."

The crime charged in the complaint alleges, merely, in words of the statute, that the defendant did "then and there have in his possession intoxicating liquor, to-wit, moonshine whiskey." Obviously this allegation does not charge a crime, direct and certain as it regards; "second. The crime charged; and, Third. The particular circumstances of the

crime charged when they are necessary to constitute a complete crime."

Sec. 2 to 13 (both inclusive) of the act provide for the legal possession of intoxicating liquor in Alaska, and, since these sections are still in force and effect there (*Abbate v. U. S.*, 270 Fed. 735), there are no "particular circumstances of the crime charged when they are necessary to constitute a complete crime" in this complaint. The second necessary element or ingredient of the crime (possession in violation of sections 2 to 13) is not charged in any apt words in the complaint. Hence there is no crime charged therein.

State v. Emmons, 104 Pac. 882; 55 Ore. 352.

State v. Townsend, (Ore.) 118 Pac. 1020.

State v. Kennedy, (Ore.) 118 Pac. 1023.

Sedgwick, Stat. & Const. Law 115.

State v. Mallory, 34 N. J. Law. 410-413.

State v. Freeman, 6 Blackf. (Ind) 248.

The "complaint", then, upon which jurisdiction in this case is based, does not state facts sufficient to constitute a crime, either in a complaint, or information, or an indictment, under that statute, because it does not negative the exception stated in the definition of the crime in the enacting clause and in section 14 of the act of Congress.

The rule in the United States courts is thus stated by the Supreme Court in the case of *United States v. Cook*, 84 U. S. 168; 21 L. Ed. 538:

"Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can-

not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. Steel v. Smith, 1 Barn. & Ald. 99; Arch. Cr. Pl. 15th Ed. 54.

* * * *

With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error. Arch. Cr. Pl. Cases, 15th Ed. 54.

Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause,

section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation and would also be defective for the want of clearness and certainty. *State v. Abbey*, 29 Vt. 66; 1. Bish. Crim. Proc. 2nd Ed. Sec. 639, N. 3.

* * * *

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception in the general clause is negatived in pleading the clause, no offense, or no cause of action will appear in the indictment or declaration when compared with the statute or contract."

United States v. Cook, 84 U. S. 168; 21 L. Ed. 538.

The following cases in the ninth circuit cite the rule with approval:

United States v. Nelson, 29 Fed. 202, 209.

United States v. Nelson, 30 Fed. 112, 115.

Shelp v. United States, 81 Fed. 694.

Hockett v. United States, 265 Fed. 588.

Davis et al. v. United States, 274 Fed. 928.

The rule is also cited in the following cases, where the indictments are held to be bad, for failing to negative the exception:

Evans v. United States, 153 U. S. 584; 38 L. Ed. 830.

Ledbetter v. United States, 170 U. S. 606; 42 L. Ed. 1162.

Maxwell etc. Co. v. Dawson, 157 U. S. 604; 38 L. Ed. 285.

United States v. Felderward, 36 Fed. 490.
 People v. Fairbanks, 7. Utah 5; 24 Pac. 538.
 Young v. Territory, 8 Okla. 528; 58 Pac. 724.
 Territory v. Scott, 2 Dak. 212; 6. N. W. 435.
 State v. Abbey, 29 Vt. 60.
 Rice v. State (Tex. Cr. App.) 38. S. W. 802.
 Mays v. State, 89 Ala. 39; 8. So. 29.
 State v. Duke, 42 Tex. 459.

Every ingredient of which the offense is composed must be clearly and accurately alleged in the indictment:

United States v. Cruikshank, 92 U. S. 558; 23 L. Ed. 593.

United States v. Mann, 95 U. S. 584; 24 L. Ed. 532.

Moore v. United States, 160 U. S. 270; 40 L. Ed. 424.

State v. Scheminisky, (Idaho) 174 Pac. 611.

State v. Cole, (Idaho) 174 Pac. 131.

The rule in United States v. Cook, *supra*, has been applied by the courts of this circuit to the prohibition clause in Section 14, Act May 17, 1884, 23 Stat. L. 24, in:

United States v. Nelson, 29 Fed. 202, 209.

United States v. Nelson, 30 Fed. 112, 116.

Shelp v. United States, 81 Fed. 694.

and to the National Prohibition Act, in the 8th Circuit in:

Massey v. United States, 281. Fed. 294.

and in those cases the court held the exceptions under these acts need not be negatived, under the second clause in the general rule.

So far as counsel is advised, however, no ruling

on this point has been made by the Circuit Court of Appeals, Ninth Circuit, in its relation to the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903.

Upon a careful examination of the foregoing authorities and the application of the general rule to the definition of the crime charged in the enacting clause in the Act and in the "complaint" herein, we submit there cannot be a sufficient statement of facts in a complaint or indictment by the mere use of the words of the statute, that the accused did "then and there have in his possession intoxicating liquor to-wit, moonshine whiskey" to constitute a crime, without negativing the exception directly or by other apt words "to show that the accused is not within the exception" made in the statute.

That being conceded, or established by the law, it follows "that the facts stated do not constitute a crime", (Sec. 2199 Comp. L. Alaska, 1913,) and that the "complaint" did not (for that reason) give the justice of the peace jurisdiction to render judgment of conviction, and all proceedings under such complaint are null and void.

10. The "Complaint" Not Good as an "Information."

The case of *Booth v. United States*, 197 Fed. 283, 285, contains an approved form of information generally used in Alaska liquor cases, though not perfectly adopted to the present Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903. It is a formal official information, by and in the name of the assistant United States Attorney, verified by him as such official, and in which he declares his official position and authority under oath.

Now in the complaint at bar there is no attempt to comply with these formal legal requisites. The complaint is signed by H. D. Stabler, and below his name are the words "Asst. U. S. Attorney", but no verification, or other record evidence follows to show that he is such an official, and we are left to guess whether the private prosecutor who signs his name to the complaint is an official mentioned in Sec's. 27 and 28 of the Alaska Prohibition Act, Feb. 14, 1917, or not. In view of the jurisdictional clause in Sec. 28, supra, "that prosecutions for violations of the provisions of this Act shall be on information filed by any such officer", and that no other person has jurisdiction or authority to begin such a prosecution by information, we think the complaint is bad as an information for the want of such proof.

We submit that the rule in respect to inferior courts admits nothing—presumes nothing not on the face of the record; that the record must show every jurisdictional fact, and that such a complaint, so signed by a private prosecutor fails to establish jurisdiction and is void.

11. A Void Warrant of Arrest.

Upon filing the complaint with the justice of the peace in the Sitka precinct, and on January 9th, 1922, the justice issued a warrant for the arrest of the accused.

(Transcript, page 16)

Under Chap 42, Code of Criminal Proc. Comp. Laws of Alaska, 1913, it is provided that:

"Sec. 2523. That upon the filing of the complaint the justice must issue a warrant of arrest for the defendant named therein."

"Sec. 2524. That a warrant of arrest in a criminal action is issued, directed, and executed in all respects as the warrant provided for in chapter thirty-two, title fifteen, of this act except that it must be made returnable only before the justice who issues it."

Chapter 32, title 15, Code of Crim. Pro. Comp. Laws of Alaska, 1913, provides the form of the warrant of arrest as follows:

"Section 2384. That a warrant of arrest is an order in writing, in the name of the United States, signed by a magistrate with his name of office, commanding the arrest of the defendant, and may be substantially in the following form: "District of Alaska, Division No. —. In the name of the United States of America.

"To the United States Marshal of the District of Alaska or any deputy, greeting: "Information upon oath having been this day laid before me that the crime of (designating it) has been committed, and accusing C. D. thereof: You are, therefore, hereby commanded forthwith to arrest the above named C. D. and bring him before me at (naming the place), or, in case of my absence or inability to act, before the nearest or most accessible magistrate.

"Dated at —, this — day of —, — hundred and —.

"E. F.

"Commissioner, Ex-Officio Justice of the Peace."

"Sec. 2385. That the warrant must specify the name of the defendant or if it be unknown to the magistrate the defendant may be designated by a

fictitious name, with a statement therein that his true name is unknown, and it must also state a crime in respect of which the magistrate has authority to issue the warrant.”

The warrant for the arrest of the appellant followed the form prescribed in section 2384, in all respects except the peremptory jurisdictional command in the last clause of Sec. 2385, that “it must also state a crime in respect to which the magistrate has authority to issue the warrant.”

The warrant stated the crime as follows:

“Information upon oath having been this day laid before me that the crime of violating the Alaska Bone Dry Act, Pub. No. 308, has been committed, and accusing Harry Mabry thereof. You are, therefore, hereby commanded forthwith to arrest,” etc.

(Transcript, page 16.)

Of course, that does not “state a crime in respect to which the magistrate has authority to issue a warrant”, or at all. Assuming, as the judge below did without evidence to support it, that the reference is to the Act of Congress of Feb. 14, 1917, 39 Stat. L. 903, still there are many crimes defined in that act, one of which is the crime of perjury, in Sec. 28, and there is nothing in this warrant to point out any special or any “crime in respect to which the magistrate has authority” as commanded in the sections above quoted. The warrant of arrest being in plain violation of the statute was void.

“The charge of the trial judge with respect to the foregoing order or process was, in effect that it was void upon its face, that it gave the sheriff no

authority for the arrest and confinement complained of, and could therefore afford him no protection in this action. The order in question was utterly void upon its face, * * *. The action of the sheriff in arresting the plaintiff under void process must be regarded in the same light as if he had arrested him without any process at all. He acted entirely without any authority of law, and was therefore a trespassor."

McLendon v. State (Tenn) 21 L. R. A. 738.

John Bad Elk v. U. S. 177 U. S. 529; 44 L. Ed. 874.

12. A Void Verdict By the Jury.

The verdict of the jury was in the following words:

"We, the undersigned jurors in the above named matter, being first duly subpoenaed and empanelled, and after hearing the evidence presented and giving sincere consideration to the same, find the defendant guilty."

(Transcript, page 20.)

Chap. 42, Code of Crim. Pro. Comp. Laws, Alaska, 1913, under "Criminal Actions in Justice's Courts," provides:

"Sec. 2534. That when the jury have agreed upon a verdict they must deliver the same to the justice publicly, who shall enter it in his docket."

"Sec. 2535. That when the defendant pleads guilty, or is convicted, either by the justice or the jury, the justice must give judgment thereon for such punishment as may be prescribed by law for the crime."

Now, section 2534, above, makes it the duty of the justice who receives the verdict to "enter it in his docket". Since there is no presumption in favor of the verdict in the justice court we must find it in his docket, or it does not exist. It was not entered "in his docket" as will clearly appear from the certified copy of "his docket" at page 28 of the Transcript. The only reference to the verdict "in his docket" reads:

"After deliberation the jury returned a verdict of guilty."

(Transcript, page 28.)

The docket also shows a further lack of jurisdiction in its failure any where to state facts from which this court can infer or presume it to "state a crime in respect to which the magistrate has authority to issue the warrant", or to support the verdict so rendered by the jury.

(Transcript, pages 25-29.)

Beginning at page 25, Transcript, the docket reads:

"Complaint made by H. D. Stabler, Ass't U. S. Attorney.

Offense charged Viol. Alaska Bone Dry Act, Pub. No. 308.

Offense committed at Sitka, on Dec. 1, 1921.

Place of arrest, Sitka," etc.

* * * *

After deliberation the jury returned a verdict of "guilty".

But no where in his docket does the justice "state a crime in respect of which the magistrate has authority to issue the warrant", nor does he any where

comply with section 2534 in respect to the verdict to "enter it in his docket".

The verdict is void for uncertainty and because the justice did not enter it in his docket.

"On the trial of two defendants for larceny, a verdict which reads, 'We, the jury, empanelled to try the above case, find the defendant guilty as charged in the indictment', is void for uncertainty. Such a verdict cannot be amended on the affidavits of the jurors, showing that they intended to convict both defendants. *Richards v. Sperry*, 7 Wis. 219. Judgment reversed and new trial ordered. *Com. v. Call*, 21 Pick. 514: *Stuart's case*, 28 Grat. 967; *Hogan v. State*, 30 Wis. 428."

State v. Weeks, 23 Ore. 3; 34 Pac. 1095.

People v. Supelveda, 59 Cal. 342.

"When a jury brings in a defective and void verdict, it is in the power of the prisoner or prisoners, as well as that of the people or prosecutor, at the time of its rendition, in the presence of the jury, to have it set right. If the prisoner or prisoners, in such case, choose not to interfere, and suffer a defective verdict to be entered by failing to interpose, objection is thereby waived to being put a second time in jeopardy for the same offense. In such cases the verdict is simply set aside as a nullity and a new trial is ordered. The court cannot make the verdict what it should be. See 1. Bish. Crim, Pro. Sec. 842; 1 Bish. Crim. Law Secs. 844-850. But the general effect of an uncertain verdict is fatal to it. See 1 Arch. Crim. Prac. 666, note a; also 3. Gran. & W. New Trials, 1378, and the cases therein cited."

Brannigan v. People, 3 Utah. 488; 24 Pac. 767.

"A good verdict must contain, either in itself or by reference to the indictment, all the elements of the crime. If silent on some element of the crime, the verdict will not sustain a judgment. 1. Bish. New Cr. Proc. Sec. 1005. It is quite apparent that this verdict, standing alone and without reference to the indictment, is not sufficient. The defendant is found "guilty of defrauding C. Schnelle" of a promissory note. There is no such crime known to the law. * * * But there is no reference in the verdict to the indictment as an aid to determine by what means the fraud was consummated and unless it was consummated as charged in the indictment not only was the verdict insufficient, but the defendant could not be found guilty at all."

People v. Cummins, 117 Cal. 497; 49 Pac. 576.

"A judgment of conviction will be reversed unless the verdict finds the defendant guilty of the offense charged in the indictment, or some offense included in the offense so charged."

The People v. Ah Gow, 53 Cal. 627.

Kimball v. Territory, 13 Ariz. 310; 115 Pac. 70.

State v. Stephanus, 53 Ore. 135; 99 Pac. 428.

The verdict is void for uncertainty, (1) because it does not state the crime with which the accused is found guilty. (2) Because it does not refer to the charge in the complaint, or any other part of the record for certainty. (3) Because the charge in the complaint lacks one necessary element of crime which is not negatived in the complaint or otherwise, and (4) because it is not entered in the justice's docket as required by Sec. 2534.

13. A Void Judgment.

There is a "sentence" but no "judgment" in this case. Chap 42 of the code of Crim. Pro. Comp. Laws of Alaska, 1913, relates to criminal actions in justice's courts, and Sec. 2539-40 and 41 therein authorizes the justice to enter judgment in criminal cases before him and fixes the form and contents thereof. Being a statutory power it must be exercised in strict compliance with the statute or it is void. These sections are as follows:

"Sec. 2539. That when a judgment of conviction is given, either upon a plea of guilty or upon a trial, the justice must enter the same in the docket substantially as follows: 'Justice's court for the precinct of _____, District of Alaska, Division No. _____, The United States of America v. A. B. (Day of the month and year.) The above named A. B. having been brought before me, C. D., a commissioner and ex-officio justice of the peace, in a criminal action, for the crime of (briefly designate the crime), and the said A. B. having thereupon pleaded "not guilty" (or as the case may be), and been duly tried by me (or a jury as the case may be), and upon such trial duly convicted, I have adjudged that he be imprisoned in the county jail _____ days and that he pay the costs of the action, taxed at _____ dollars (or that he pay of (a) fine of _____ dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding _____ days, as the case may be). C. D., Commissioner and ex-officio justice of the peace.

"If the defendant has pleaded guilty, instead of

the paragraph commencing "and the said A. B.", and ending "upon such trial duly convicted", the entry must state substantially as follows: "And the said A. B. having been thereof duly convicted upon a plea of guilty."

"Sec. 2540. That an entry of judgment and the transcript thereof, made or filed as in the last two sections provided, is conclusive evidence of the facts stated therein."

"Sec. 2541. That the judgment must be executed by the United States marshal or any deputy, upon receiving a certified copy of the entry of judgment, and such copy shall also be deemed an execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein."

The certified copy of the justice's docket in this case will be found at pages 25-29, Transcript. At page 25 the docket shows:

"Docket Entries

"Complaint made by H. D. Stabler, Asst. U. S. Attorney.

Offense charged Viol. Alaska Bone Dry Act. Pub. 308.

Offense committed at Sitka on Dec. 1, 1921.

Place of arrest—Sitka.

Disposition of case—defendant tried by jury, convicted and sentenced.

Jany. 9, 1922. Complaint sworn to and filed by H. D. Stabler, assistant United States Attorney charging Harry Mabry with Violating the Alaska Bone Dry Act. Pub. 308."

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(Page 28) "After deliberation the jury returned a verdict of guilty.

"In view of the evidence and the jury verdict, I have adjudged that Harry Mabry be imprisoned in jail for a period of four months and that he pay the costs of the action taxed at Ninety three and 55-100 dollars ,and that he pay a fine of Six hundred dollars and be imprisoned in jail until such fine and costs be paid, not to exceed three hundred days.

"R. W. DeArmond, United States Commissioner, Ex-Officio Justice of the Peace, Sitka Precinct, Alaska."

That is the only judgment in this case,—the paper on page 21 of the Transcript is what the justice says upon its face is a true copy of the original entry of judgment, and is the warrant of commitment in this case, and not the judgment.

In addition, however, to this "judgment" in the docket there is another entered by the judge of the district court on his dismissal of the attempted appeal of the prisoner from the justice's court to the district court.

(Transcript, pages 38 and 45.)

In that dismissal the district judge ordered: "And it is further ordered and adjudged that the judgment heretofore had in said cause in the United States Commissioner's court for Sitka Precinct, on the 9th day of January, 1922, to-wit, that the defendant serve three months' confinement in the jail at Juneau, Alaska, and to pay a fine of \$600.00 and the costs of the action be and the same hereby is affirmed."

(Transcript, pages 39 and 45.)

Notice the district judge's affirmance fixed the term of appellant's imprisonment at "three" months instead of four months ,to be served in the jail at "Juneau, Alaska," instead of Sitka, and also he affirmed the imprisonment for non-payment of the costs. This order of affirmance was assumed to be made under the provisions of Sec. 2559 Compiled Laws of Alaska, 1913, on the dismissal of the attempt of the defendant to appeal his case, and not upon any original jurisdiction or trial of any kind before the district court.

Bailey on Habeas Corpus, Vol. 1, page 751.

Where the lower court had no jurisdiction the appellate court will have none on appeal.

Chaves v. Pena, 2 Pac. 73; 3 N. M. 89.

Chadwick v. Chadwick, 13 Pac. 385; 6 Mont. 566.

Armour Co. v. Howe, 64 Pac. 42; 62 Kan. 587.

In re Searles, 127 Pac. 902; 46 Mont. 322.

Evans v. Oregon Short Line, 149 Pac. 715.

Bank v. Courtwright, 158 Pac. 277; 82 Or. 490.

Tracy v. Sumida, 161 Pac. 503; 31 Cal. App. 716.

Burt & Co. v. Marks, (Utah), 177 Pac. 224.

Valencia Co. v. Neilson, (N. M.) 192 Pac. 510.

Under the statutes of Alaska, Secs. 2539, 2540 and 2541, last above quoted ,the judgment in this case was and is void (1) because it was not entered in the docket substantially as required by the explicit requirements of Sec. 2539, or at all, and (2) because it did not state any crime upon which the defendant was convicted, as also specifically required by Sec. 2539, (3) because it does not state when the alleged crime was committed, (4) nor the place where it was committed,—whether within the

jurisdiction of the justice court or not, (5) nor in what jail he is to be confined, (6) nor does it show whether it was a crime within the jurisdiction of the justice, a misdemeanor or not.

1. It is too clear for argument that the mere entry of the sentence in the justice's docket at page 28 of the Transcript is not even an attempt to comply with the particular command of the statute in Sec. 2539, supra: "That when a judgment of conviction is given * * * the justice must enter the same in the docket substantially as follows." Since no such judgment was entered in his docket, the justice lost jurisdiction at that point, even if he ever had such jurisdiction.

2. The mere statement elsewhere than in his docket, or even in his docket, that the defendant was brought before him "in a criminal action for the crime of violating the Alaska Bone Dry Act," without any other statement of "the crime" renders the judgment void for uncertainty and for non-compliance with the law and the form as provided for such cases.

Assuming as the lower court did in his "memorandum opinion", that the defendant was accused of some violation of the Alaska Prohibition Act of Feb. 14, 1917, 39 Stat. L. 903, this judgment is void because it did adjudge him convicted of one of the many crime denounced therein ,among which is perjury (Sec. 28), over which the justice had no jurisdiction in any event.

3. Since neither the verdict nor the judgment refers to the "complaint" in this case for the particulars of the crime charged, there is no time fixed

in the judgment when it occurred,—it may be barred by the statute of limitations.

4. The "judgment" in the docket, page 28, Transcript, does not fix the place of confinement,—just "in jail", and it is void for that reason.

5. Nor does the verdict nor the judgment, by reference to the complaint, nor in any other way, disclose whether the alleged crime of the violation of the "Alaska Bone Dry Law" occurred within the Sitka precinct, or the First Division, or even in Alaska.

6. And, finally by failure in the verdict and in the alleged judgment to specifically declare the crime of which the defendant was guilty, this court cannot now say what the crime was, nor whether it was within the jurisdiction of the justice, nor which one of the many crimes (including the perjury of Sec. 28) denounced in the Act it may have been. The judgment is clearly void for uncertainty, and for failure to enter it in compliance with the statute.

"It is undoubtedly the general rule that a judgment rendered by a court in a criminal case, must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment void.

Graham v. Weeks, 138, U. S. 461; 34 L. Ed. 1051.

In the case of Mackey, et al. v. Miller, 126 Fed. 161, the United States Circuit Court of Appeals, Ninth Circuit, said:

"The appellants contend that the judgment of the district court is void for the reason that the in-

dictment charges no offense against any law of the United States,"—and on page 163, the court held:

"Question is made of the power of this court upon habeas corpus to discharge the appellants upon the facts set forth in the record, and it is said that the writ of habeas corpus cannot be used to perform the function of a writ of error. But the doctrine is well established that upon a writ of habeas corpus, if it appear that the court which rendered the judgment had not jurisdiction to render it, either because the proceedings under which they were taken were unconstitutional or for any other reason, the judgment is void, and may be questioned collaterally, and the person who is imprisoned thereunder may be discharged from custody on habeas corpus. *Ex parte Neilsen*, 131 U. S. 176, 182; 9 Sup. Ct. 672; 33 L. Ed. 118; *Ex parte Lange*, 18 Wall, 163; 21 L. Ed. 872; *Ex parte Siebold*, 100, U. S. 371; 25 L. Ed. 717. If it be true that the acts committed by the appellants, which are set forth in the indictment in this case, are not within the intendment of Sec. 5447 of the Revised Statutes (11 Comp. St. 1901, p. 3678), they do not constitute an offense against that statute, or against any other statute of the United States. Such being the case, it appears affirmatively from the return that the appellants are held in custody under a judgment which upon its face is void. * * * The decision of the case turns upon the question whether the appellants are imprisoned unlawfully, for the reason that the judgment is void."

Mackey v. Miller, 126 Fed. 161, 163.

A somewhat similar judgment was considered by the Supreme Court of the United States in the case

of Pointer v. United States, 151, U. S. 396, 418; 38 L. Ed. 209, 217, where that court said:

"The specific objection to the sentence is that it does not state the offense on which the defendant was found guilty, or that the defendant was guilty of any named crime. * * * While the record of a criminal case must state what will affirmatively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, "all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another", 1. Bishop Crim. Proc. Secs. 1347-1348. For these reasons the objection last stated is not sustained."

Pointer v. United States, *supra*.

The following cases are identical with the case of Pointer v. U. S. *supra*, and cite it as an authority:

Sandy White v. United States, 164 U. S. 100; 41 L. Ed. 365.

Ex parte Thurston, 233 Fed. 847.

The case at bar is the exception which proves the rule in the Pointer case. In this case the record of the justice's court shows only an insufficient charge, and neither the warrant of arrest, nor the order for the jury, nor the subpoena, nor the verdict, nor the judgment, nor any other part of the record, shows the name or the nature of the crime of which the defendant was convicted.

Then, too, the rule that a deficiency in the record may be supplied from other parts thereof applies only to superior courts of record and not to such inferior courts as justices of the peace:

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. * * * Without straining either the constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority and he should, therefore, be discharged."

Ex parte Lange, 85 U. S. 163; 21 L. Ed. 872.

"The judgment of the court must in all cases be based upon the verdict of the jury, and the verdict of the jury must be responsive to the issue joined by the indictment or information and the plea of the person on trial thereto, otherwise, the court is without jurisdiction to render judgment thereon. * *

* In a late work on Jurisdiction the author, in discussing the three essential elements necessary to render a conviction valid, says: "These are that the court must have jurisdiction over the subject matter, the person of the defendant, and authority to render the particular judgment. If either of these elements are lacking, the judgment is totally defective," Brown on Jurisdiction, par. 110."

Ex parte Harris — Okla—; 128 Pac. 156.

14. A Void Commitment.

A copy of a legal judgment of a justice of the peace in a criminal case within his jurisdiction, properly certified and delivered to the marshal, is made a sufficient warrant of commitment in Alaska.

“Section 2541. That the judgment must be executed by the United States marshal or any deputy, upon receiving a certified copy of the entry of judgment and such copy shall also be deemed an execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein.”

The following is the only warrant of commitment shown on the face of the record or return in this case:

(Caption and Title.)

“Violation of Alaska Bone Dry Law, or Pub. No. 308.

“JUDGMENT.

“On the 9th day of January, 1922, the above named Harry Mabry having been brought before me, R. W. DeArmond, a U. S. Commissioner and Ex-Officio Justice of the Peace at Sitka, Alaska, in a criminal action for the crime of violating the Alaska Bone Dry Law and the said Harry Mabry having pleaded not guilty and been duly tried by jury trial and upon such trial Harry Mabry having been duly convicted, I have adjudged that he be imprisoned in the jail at Sitka for four months and that he pay the costs of the action taxed at Ninety three and 55-100 dollars, and that he pay a fine of Six hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, not exceeding Three hundred days.

**"A TRUE COPY OF THE ORIGINAL
ENTRY OF JUDGMENT**

"In witness whereof I have set my hand at Sitka,
Alaska, this 9th day of January, 1922.

(Seal) R. W. DeArmond,
U. S. Commissioner and ex-officio Justice of the
Peace.

(Endorsed)

United States of America) ss.
District of Alaska)

"I certify that I received the within commitment
on the 9th day of January, 1922, and executed
the same on the 9th day of January, 1922, by delivering
the within named defendant to the jailer of
the U. S. Jail at Sitka, Alaska.

Geo. D. Beaumont,
U. S. Marshal, by S. G. Thomas, Deputy U. S.
Marshal."

(Transcript, pages 21-22.)

One of the first habeas corpus decisions written by Chief Justice Marshall is that in the case of *Ex parte Burford*, 3 Cranch. 448; 2 L. Ed. 495., in which habeas corpus was brought to test the legality of imprisonment under commitment from a justice of the peace:

"In the present case, the marshal's return, so far as it stated the warrant upon which Burford was arrested and carried before the justices, was perfectly immaterial. He did not complain of that arrest, but of his commitment to prison. The question is, what authority has the jailer to detain him? To ascertain this we must look to the warrant of commitment only. It is that only which can justify his

detention. That warrant states no offense. It does not allege that he was convicted of any crime. It states merely that he had been brought before a meeting of many justices, who had required him to find sureties for his good behavior. It does not charge him of their own knowledge, or suspicion, or upon oath of any person whomsoever. HELD. A warrant of commitment by justices of the peace must state a good cause certain, supported by oath."

Ex parte Burford, 3 Cranch 448; 2 L. Ed. 495.

United States v. Martin, 17 Fed. 156.

United States v. Tureaud, 20 Fed. 621.

Erwin v. United States, 37 Fed. 470.

"The mittimus must be in writing, under the hand and seal of the magistrate issuing it, showing his authority. It must be properly directed, and must set forth the crime alleged against the party with convenient certainty, and ought to have a lawful conclusion."

Sanders v. United States, 73 Fed. 782, 785.

A warrant of commitment which does not state the offense for which the prisoner is convicted, is void.

In re Ring, 28 Cal. 253.

Ex parte Dobson, 31 Cal. 497.

Ex parte Gibson, 31 Cal. 621.

Ex parte Dela, 25 Nev. 346; 60 Pac. 217.

A commitment is a warrant, order, or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there. From the earliest times, as appears from the reported cases on the subject, this process was required to contain a statement of the nature of the

crime with which the prisoner was charged. The legal requisites of such a process are thus described by an acknowledged authority on the subject of crimes and criminal procedure as defined by the common law: "It must be in writing, under the hand and seal of the person by whom it is made, and expressing his office or authority ,and the time and place at which it is made, and must be directed to the jailer or keeper of the prison. It may be made either in the name of the King, and only tested by the person who makes it, or may be made by such person in his own name. It may command the jailer to keep the party in safe and close custody; for, if every jailer be bound by law to keep his prisoner in such custody, surely it can be no fault in a mittimus to command him to do so. It ought to set forth the crime alleged against the person with convenient certainty, whether the commitment be by the privy council or any other authority; otherwise the officer is not punishable by reason of such mittimus for suffering the party to escape, and the court before whom he is removed by habeas corpus ought to discharge or bail him. And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth that the court cannot adjudge whether it were a reasonable ground of imprisonment."

Allen v. Hagen, 62 N. E. 1086; 170 N. Y. 46.
(Citing 2 Hawk. P. C. p. 119, c. 16.)

"A commitment, in the absence of any statutory provisions prescribing its form and contents, does not sufficiently state the offense by simply designating it by the species or class of crimes to which

the committing magistrate may consider it to belong, but in order to be a sufficient or valid commitment it ought to state the facts charged or found to constitute the offense with sufficient particularity to enable the court, on a return to the habeas corpus, to determine what particular crime is charged against the prisoner."

State v Birchim, 9 Nev. 95, 100.

A commitment issuing from inferior courts must state the offense with reasonable certainty; failing which it is void.

Hurd on Habeas Corpus, 2nd Ed. page 371.

A comparative view of the alleged "judgment" in the docket (page 28 Tr.) with the "certified copy" page 21, Tr.), and in the trial judge's affirmance (page 39-45 Tr.), shows: The "judgment" in the docket does not contain a statement of any crime; the "certified copy" contains the statement "a criminal action for the crime of violating the Alaska Bone Dry Law"; the district judge, finding that he has "no jurisdiction", then affirms the "judgment", minus the crime, by affirming a different penalty; in the "judgment" the justice adjudges that the defendant be "imprisoned in jail", whereas the "certified copy" says "imprisoned in the jail at Sitka" for four months, while the district judge's order of affirmance says "three months confinement in the jail at Juneau, Alaska"; the "judgment" orders that defendant "be imprisoned in jail until such fine and costs be paid"; the order of affirmance omits that clause entirely; etc., etc.

In re John Bonner, 151 U. S. 242; 38 L. Ed. 149.
Execution of judgments in criminal cases are pro-

vided for in chapter 20, Sec's. 2305-10, Code Crim-Pro., Compiled Laws of Alaska, 1913.

“Sec. 2305. That when a judgment, except of death, has been pronounced, a certified copy of the entry thereof upon the journal must be forthwith furnished by the clerk to the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.”

“Sec. 2309. That a judgment in a criminal action, so far as it requires the payment of money, whether the same be a fine or costs and disbursements of the action ,or both, in addition to the means in this chapter provided, may be enforced as a judgment in a civil action.”

Judgments are enforced in civil actions as provided in Chap. 96, Code Crim. Pro., Secs. 1813-1826, Compiled Laws of Alaska, 1913.

So much of the justice’s judgment against defendant as requires him to be imprisoned in jail, or “in jail at Sitka”, or “in jail at Juneau, until such fine and costs be paid,” is void.

Booth v. United States, 197 Fed. 283; 287.

State v. Shepard, 15 Ore. 508; 16 Pac. 483.

The commitment is void, (1) because it is not a “certified copy of the entry of judgment” (Sec. 2541), (2) because it does not state any crime known to our law, nor any crime within the jurisdiction of the justice, nor at all, (3) because it does not conform to the statutory requirements so as to make the marshal responsible under his bond in case of refusal to comply with it, nor to protect him in false imprisonment, (4) because it is in plain violation

of the statute, and (5) because, not being a true and correct "certified copy", and being otherwise in violation of the statute, it is not a valid "execution against the property of the defendant for the purpose of collecting the amount of any fine or costs mentioned therein." (Sec. 2541.)

15. "Alaska Bone Dry Law" Repealed.

The "Alaska Bone Dry Law", to-wit, the Act of Congress entitled "An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes," 39 Stat. L. 903, approved Feb. 14, 1917, was repealed by the 18th amendment to the Constitution of the United States, and by the provisions of the National Prohibition Act, entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries." 41 Stat. L. 305, approved Oct. 28, 1919.

Abbate v. United States, 270 Fed. 735. (Dissenting opinion, pp 737-740.)

16. Appellant Is Imprisoned in Violation of the Constitution.

The appellant is imprisoned on a complaint which does not state facts sufficient to constitute a crime and which was filed in the action against him in violation of the express provisions of the law; under a warrant of arrest which does not state probable cause on oath, and does not state any crime of which the appellant is accused and which was issued in violation of the express provisions of the law; un-

der a verdict which does not state any crime of which the appellant was found guilty by the jury, and which was received and filed in violation of law; under a pretended judgment which does not state the time or place when and where appellant committed any crime, nor the name nor the character of the crime of which it is pretended this appellant is guilty, and is void because the said judgment was entered in this case in violation of the express provisions of the statute; under a pretended commitment which was issued in violation of the express provisions of the statute, and which does not state the crime for which the appellant is imprisoned, nor the time nor place where it was committed.

Appellant's constitutional rights are violated in this:

First. The appellant is imprisoned in violation of the law of the land and without due process of law, and in violation of his rights under the Fifth Amendment to the Constitution of the United States.

Second. The appellant is imprisoned in violation of the law of the land, and in violation of his rights under the Sixth Amendment to the Constitution of the United States, because he has not been and is not now informed of the nature and cause of the accusation against him in this case.

Wherefore appellant is entitled to be discharged on the writ of habeas corpus in this case.

JAMES WICKERSHAM,
JOSEPH W. KEHOE,
Attorneys for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT
February Term, 1923

No. 3866

HARRY MABRY,
Appellant

v.

GEORGE D. BEAUMONT,

As United States Marshal, for the Territory of
Alaska, First Division,

Appellee.

Upon Appeal from the United States District
Court for the District of Alaska,
Division No. 1.

BRIEF OF APPELLEE

A. G. SHOUP,
United States Attorney.

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Special Assistant
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on Brief.

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STATEMENT OF THE CASE

The above entitled action was brought by Harry Mabry, appellant, upon habeas corpus proceedings in the District Court for the First Division, District of Alaska, on March 25th, 1922, resulting in an order of said District Court discharging the Writ of Habeas Corpus and remanding appellant into the custody of appellee, George D. Beaumont, United States Marshal, whereupon appeal was taken by appellant to this Court.

The facts are: Appellant, Harry Mabry, was convicted before a jury in the United States Commissioner's, ex-officio Justice of the Peace, Court, at Sitka, Alaska, on January 9, 1922, of the crime of possessing intoxicating liquor, to-wit, moonshine whisky, contrary to, and in violation of, the provisions of the Alaska Bone Dry Act. There was nothing whatever, or at all, at the trial or in the record of the case, to warrant the statement in the opening paragraph of appellant's brief that the appellant was accused of a violation of 'said Act "by taking a drink of 'moonshine whisky' with some friends.'" Appellant was accused and convicted of having in his possession intoxicating liquor, to-wit, moon-

shine whisky, in violation of said Act; and the facts developed at the trial were that said appellant had in his possession, unlawfully, about two quarts of moonshine whisky which appellant furnished to other persons for intoxicating beverage purposes. So the attempt to belittle appellant's violation of the Act by stating that appellant took a drink of moonshine whisky with some friends is a gross misstatement and not supported by either theory or fact.

Appellant was subsequently sentenced to serve four months in jail and to pay a fine of \$600.00, and to pay the costs of the action. On January 11, 1922, appellant, by his attorneys Wickersham and Kehoe, served his Notice of Appeal from said judgment on the United States Attorney; on January 14, 1922, he executed and filed with the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, his Bail Bond, approved by said United States Commissioner in the sum of \$1200.00, and was discharged from custody by an order of the said United States Commissioner at Sitka. Thereafter, to-wit, January 18, 1922, as appellant, the said Harry Mabry filed in the District Court for the District of Alaska, Division Number One, at Juneau, his Notice of Appeal from the said judgment of the Commissioner's Court at Sitka. He wholly failed to furnish, within 30 days allowed by statute, his Undertaking for Appeal costs as required by sections 2551 and

2552 of the Compiled Laws of Alaska. On March 16, 1922, because of such failure, on motion of the United States Attorney, the District Court dismissed said pretended appeal and affirmed the judgment of said United States Commissioner's Court for Sitka Precinct, according to the provisions of section 2559, and chapter 53, of said Compiled Laws of Alaska. Thereafter, to-wit, on March 24, 1922, defendant was imprisoned in pursuance of said District Court's judgment. On March 25, 1922, appellant petitioned said District Court for his release from said imprisonment by Habeas Corpus proceedings, and on April 3, 1922, the District Court dismissed the Writ and remanded appellant to the custody of the above named appellee George D. Beaumont, United States Marshal. Thereafter, on April 5, 1922, appellant filed in the District Court his Bail Bond in the sum of \$2000.00 and at all times since said last mentioned date has been enlarged upon said bond. His appeal from the order dismissing the Writ and remanding him into custody was allowed April 5, 1922.

ARGUMENT

(a) There are four distinct reasons why Habeas Corpus should not lie in this case:

1. Appellant could have appealed to the District Court from the Justice 's proceedings and judgment.

2. Appellant could have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal.

3. Appellant is not illegally restrained—he has been released on bail pending appeal from an order remanding him in habeas corpus proceedings.

4. The said appellant was not entitled to prosecute the Writ, according to chapter 57 Compiled Laws of Alaska.

(b) If it can be held that Habeas Corpus was proper in this case appellant was not entitled to relief on the merits of the case.

1. Appellant could have appealed to the District Court from the Justice's proceedings and judgment.

Instead of perfecting his appeal according to law and thereby obtaining his trial *de novo* in the District Court, this appellant, after his pretended appeal was dismissed in the District Court, brought Habeas Corpus proceedings and raised numerous objections to the proceedings and judgment in the Commissioner's (Justice's) Court. Every question that he has raised hereby Habeas Corpus could have been settled had he made a valid appeal from the Justice's judgment.

It is elementary law that a writ of habeas cor-

pus is not designed to fulfill the functions of an appeal, review, or writ of error, from a judgment or order made by a judge or court acting within his or its jurisdiction.

21 Cyc 285, 29 CJ 25, section 19;
21 Cyc 294;
12 RCL 1185, section 8;
12 RCL 1192, section 15;
In re McKenzie, 180 U. S. 536, at page 546;
Savin petitioner, 131 U. S. 267, at page
279-280;
Ex parte Yarbrough, 110 U. S. 653;
Bailey on Habeas Corpus, par. 30;
In re Habeas Corpus of Burkell, 2 Alaska
108.

The authors of *Habeas Corpus*, 29 CJ 17, section 9, say:

“As in the case of other extraordinary prerogative writs, the writ of habeas corpus will not ordinarily be granted where there is another adequate remedy by appeal or writ of error or otherwise.”

And further in 29 CJ 19, section 11:

“Ordinarily the writ of habeas corpus will not be granted when there is an adequate remedy by writ of error or appeal * * * the obstruction of the right of appeal, or the total absence of a remedy by appeal or writ of error, is not of itself any ground for granting relief by

means of a writ of habeas corpus. Habeas corpus cannot be employed as a substitute for writ of error, appeal, certiorari, or similar proceedings."

And further in 29 CJ 25, section 19:

(Habeas corpus) "is not available as a substitute for an appeal or writ or error or other revisory remedy for the correction of errors either of law or fact, at least not in the absence of extraordinary circumstances."

And, according to the authority of the Court of Criminal Appeals of Texas in *Ex parte English* (Tex. Cr.) 53 S. W. 106, dismissal of appeal does not change the rule. This court said:

"We have repeatedly held that the writ of habeas corpus cannot be used as a writ of appeal, writ of error, or certiorari, nor has it the force or effect of such proceedings. It does not reach such errors or irregularities as would render a judgment voidable merely, but only such irregularities as renders it absolutely void. Appellants had their day in court in this case. Their right of appeal was ample. They failed to comply with the law in reference to appeal bonds, and they were not authorized, after their case had been dismissed by the County Court, to appeal to this court through the writ of habeas corpus." Judgment affirmed. Citing authorities.

The case of *Arnold v. Schmidt*, 155 Wis 55, 143 N. W. 1055, holds:

"The appeal was improperly dismissed; but that error is not available in this (habeas corpus) proceeding."

The case of *U. S. v. Wolters*, 268 Fed. 69, holds that improper denial of appeal is not ground for habeas corpus. 29 CJ 33, note 39 (32). This court said:

"That would be a mere irregularity; if he was entitled to appeal, that right could be enforced by mandamus or some other proper remedy."

According to the foregoing authorities, it would appear that appeal from the Justice's proceedings and judgment was the proper remedy, and not habeas corpus.

Now this appellant, after the expiration of the 30 days allowed by law in which to perfect appeal from a Justice Court to a District Court in criminal cases, (section 2551 Compiled Laws of Alaska) attempted to prosecute his appeal in the District Court. But there is nothing in the record to show that he did not abandon his Notice of Appeal and his pretended appeal; because for more than 30 days from the date of entry of judgment by the Justice at Sitka he did nothing toward perfecting his said appeal, except to serve and file his Notice of Appeal. But supposing that he did in fact intend to appeal to the District Court from said judgment of conviction, then he did in fact select the proper remedy. It

was only when said pretended appeal failed that he brought habeas corpus proceedings, and thereby sought to do by habeas corpus what he failed to do by appeal, that is to say, he attacked all the proceedings had in the Justice's court raising both questions of law and of fact. If this could be done, then a defendant in a criminal action in the Commissioner's (Justice's) Courts of Alaska, instead of prosecuting his appeal in the proper District Court, according to law, could proceed either before or after his right of appeal had expired and have questions of law and fact, which ought to be settled by appeal, settled in habeas corpus proceedings. This, we maintain, upon the authority of the foregoing decisions, he could not lawfully do. His remedy was appeal. Dismissal or failure of the appeal does not change the rule. *Ex parte Schwartz*, 2 Tex. A. 74; *Ex parte English* (Tex. Cr.) 53 S. W. 106.

2. Appellant could have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal.

The appellant in this case was tried by a jury and convicted before the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, of a misdemeanor, to-wit, having intoxicating liquor in his possession in violation of the Alaska Bone Dry Act. Section 1 of the Alaska Bone Dry Act denounces the possession of in-

toxing liquor as a misdemeanor, and by section 366 and section 2519 of the Compiled Laws of Alaska, and by section 28 of the Alaska Bone Dry Act, within the jurisdiction of the United States Commissioner, at Sitka, sitting in his capacity of ex-officio Justice of the Peace. And said Commissioner had jurisdiction over appellant's person. Appellant was duly brought before the Commissioner on a valid warrant (erroneously called "Bench Warrant," page 16 Transcript). He submitted to the jurisdiction of the court without any objection whatever, or at all. He demanded and had a jury trial, and had the aid of a member of the bar for counsel. He was found guilty by the jury and gave notice of appeal. He furnished a bail bond in the sum of \$1200.00 and secured his release from custody after conviction and pending appeal. However, he did nothing further toward perfecting his appeal. He did not comply with the statute providing for appeals in criminal actions from justice's courts in this: he wholly neglected and failed to furnish the Undertaking on Appeal required by sections 2550 and 2551 of the Compiled Laws of Alaska. For which reason, upon motion of the United States Attorney, the District Court dismissed said appeal and rendered judgment as provided by section 2559 Compiled Laws of Alaska. (Page 38 Transcript.)

Now the appellant in said order dismissing his

said pretended appeal reserved his exception to the order which was by the court allowed. (Page 39 Transcript.) But he did nothing toward appealing from that final order of dismissal to the Circuit Court of Appeals. Appellant could have appealed from that final order of dismissal rendered by the District Court. *Cartier v. U. S.* (CCA) 248 Fed. 804. Instead of appealing from that final order he brought habeas corpus proceedings and attacked the said final order of the District Court and the proceedings and judgment rendered in the Justice Court. If this final order dismissing the appeal and affirming the Justice's judgment was for any reason contrary to law or invalid appellant could have secured relief by Writ of Error or Appeal. As we have heretofore seen, habeas corpus is not designed or intended to take the place of Appeal or Error. This appeal should now be dismissed in this Court. Appellant should have prosecuted his Writ of Error or Appeal from said final order and judgment of dismissal. Section 2311 Compiled Laws of Alaska.

(3) Appellant's appeal in this case should now be dismissed in this Court for the reason that he is not now illegally restrained. He has been released on bail pending appeal from an order remanding him in habeas corpus proceedings.

The appellant herein, Harry Mabry, on April

5, 1922, furnished his Bond on Appeal (page 105 Transcript) in the sum of \$2000.00 and was on the same day released from custody. In his bail (supersedeas) bond (page 105 Transcript) he recites:

“ * * * whereas, the above bounden Harry Mabry, has appealed to the Circuit Court of Appeals for the Ninth Circuit from judgment rendered against him in the District Court for Division Number One, at Juneau, District of Alaska, on the 3d day of April, 1922, in that certain cause in which Harry Mabry is plaintiff and the said George D. Beaumont, United States Marshal, is defendant, discharging the writ of habeas corpus therein and remanding the above appellant, plaintiff below, to the custody of him, the said defendant, and whereas the above named appellant has been ordered enlarged upon recognizance in the sum of \$2000.00 * * * ”

And he was released by order of the District Court on April 5th, 1922, (page 107 Transcript) and discharged from custody. It is clearly in the record and it is a fact that appellant has not at any time since April 5, 1922, been in the custody of, or restrained by, appellee, United States Marshal. The appeal should be dismissed in habeas corpus proceedings when during the pendency of said appeal the person restrained is released on bail.

The authors of *Habeas Corpus*, 29 CJ 191-192, section 222 say:

"Except in a few jurisdictions (citing *Costello v. Palmer*, 20 App. [D. C.] 210) the proceedings to review will be dismissed when, during their pendency, the relator was released on bail."

- Johnson v. Hoy*, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. 497;
- Cook v. Lowry*, 148 Ga. 516, 97 S. E. 440;
- Carter v. Gabrels*, 136 Ga. 177, 71 S. E. 3;
- Ex parte Hengy*, 77 Tex. Cr. 621, 179 S. W. 716;
- Ex parte Harvey*, 77 Tex. Cr. 299, 177 S. W. 1174;
- Ex parte Richie*, 77 Tex. Cr. 71, 177 S. W. 85;
- Ex parte Crumpton*, 74 Tex. Cr. 204, 167 S. W. 844;
- Ex parte Simpkins*, 72 Tex. Cr. 90, 161 S. W. 97;
- Ex parte Parvin*, 63 Tex. Cr. 512, 140 S. W. 439;
- Ex parte Elmore*, (Tex. Cr.) 88 S. W. 347;
- Ex parte Walton*, 45 Tex. Cr. 74, 74 S. W. 314;
- Ex parte Talbutt*, 39 Tex. Cr. 12, 44 S. W. 832;
- Ex parte Branch*, 36 Tex. Cr. 384, 37 S. W. 421;
- Ex parte Erwin*, 7 Tex. A. 288;
- Ex parte Peyton*, 2 Tex. A. 295;
- Wales v. Whitney*, 114 U. S. 564;
- Contra: Mackenvie v. Barrett*, 141 Fed.

964, 73 CCA 280, 5 Ann. Cas. 551.

The law does not require a vain thing to be done. It has been repeatedly held in Texas that though an applicant for a writ of habeas corpus is in jail at the time the application is made and heard, if an appeal is entered the suit will be abated by the applicant's giving bond thereby releasing him from actual custody pending the appeal.

Tyler v. State, 133 S. W. 1046, 61 Tex. Cr. R. 66;

Ex parte Stephenson, 140 S. W. 94, 63 Tex. Cr. R. 274;

Ex parte Eldridge, 162 S. W. 1149, 72 Tex. Cr. R. 529.

The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner, where he is admitted to bail pending the appeal.

Ex parte Harvey, 177 S. W. 1174, 77 Tex. Cr. R. 299;

Ex parte Hengy, 179 S. W. 716, 77 Tex. Cr. R. 621.

Where a party sues out a habeas corpus, and is remanded and allowed to enter into a recognizance on appeal, the Court of Criminal Appeals has no jurisdiction, and the appeal will be dismissed.

Ex parte Parvin, 140 S. W. 439, 43 Tex.

Cr. R. 512;

Ex parte Crumpton, 167 S. W. 844, 74 Tex.

Cr. R. 204.

Where accused, remanded to the custody of the sheriff to be released on bond, appealed, his appeal should be dismissed for want of jurisdiction if he afterwards entered into bond.

Ex parte Simpkins, 161 S. W. 97, 72 Tex.

Cr. R. 90.

Contrary to the foregoing holdings is the case of *Costello v. Palmer*, 20 App. Cas. (D. C.) 210, wherein the court holds that a person on bail is in the custody of the law and is restrained of his liberty and therefore release on bail pending appeal from final order in habeas corpus proceedings is not ground for dismissal.

The only other decision we have been able to find against this proposition is *Mackenzie v. Barrett*, 141 Fed. 964, 73 CCA 280, 5 Ann. Cas. 551, and note, wherein it is held that habeas corpus proceedings are not abated by the release of the petitioner on bail pending his appeal from an order denying the writ. In the *Mackenzie* case, however, the decision is questioned in the case of *Sebray v. U. S.* 185 Fed. 401, wherein the court says at page 404:

"In the case of *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748, the Supreme Court

reversed Judge Swayne, whose opinion is referred to by the Circuit Court of Appeals in *MacKenzie v. Barrett, supra.*"

In the case of *Johnson v. Hoy*, United States Marshal for the Northern District of Illinois, 227 U. S. 245, the United States Supreme Court at page 247 says:

"The orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on habeas corpus, the constitutionality of the statute under which he was indicted, was decided in *Glasgow v. Moyer*, 225 U. S. 420. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion * * * citing *Riggins v. U. S.*, 199 U. S. 547 * * * But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of habeas corpus was intended to afford to those held under warrants

issued on indictments, the appeal must be dismissed." Approved and followed in the case of *Craig v. Jarrett*, Sheriff, 234 U. S. 752; and in the case of *Daeche v. Bollschweiler*, U. S. Marshal, etc., 241 U. S. 641.

Counsel for appellee maintain that this appeal should now be dismissed because appellee has not appellant's person in custody, illegally or otherwise. Appellant has been released on bail pending his appeal from the order of the District Court dismissing the writ and remanding him into the custody of appellee.

(4) APPELLANT WAS NOT ENTITLED TO PROSECUTE HABEAS CORPUS, according to chapter 57, Compiled Laws of Alaska, relating to the Writ of Habeas Corpus.

Appellee maintains that chapter 57, Compiled Laws of Alaska, relating to the Writ of Habeas Corpus, denies to appellant the right to prosecute the writ of habeas corpus, and that the District Court properly dismissed the Writ and remanded this appellant. Section 1399 of chapter 57 provides:

"Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, SHALL NOT BE ALLOWED TO PROSECUTE THE WRIT."

Section 1410 provides:

"The court or judge before whom the party shall be brought on such writ shall, immediately after the return thereof, proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not."

Section 1412 provides:

"It shall be the duty of the court or judge forthwith to remand such party if it shall appear that he is legally detained in custody."

Section 1414 provides:

"But no court or judge, on the return of a writ of habeas corpus, has power to inquire into the legality or justice of any order, judgment, or process specified in section 1399, nor into the justice, propriety, or legality of any commitment for a contempt made by a court, officer, or body, according to law, and charged in such commitment, as provided by law."

Section 1415 provides:

"If it appear that the party has been legally committed for a criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be probably guilty of such offense, although the commitment be irregular, he shall forthwith be remanded to the

custody or placed under the restraint from which he was taken, if the officer or person under whose custody or restraint he was be legally entitled thereto; if not so entitled, he shall be committed to the custody of the officer or person so entitled."

Section 1419 provides:

"The plaintiff in the proceeding, on the return of the writ, may, by replication, verified as in an action, controvert any of the material facts set forth in the return, or he may allege therein any fact to show, either that his imprisonment or restraint is unlawful, or that he is entitled to his discharge; and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint, or against the same, and to dispose of the party as the law and justice of the case may require."

Section 1420 provides:

"The plaintiff may demur to the return, or the defendant may demur to new matter, if any, set forth in the replication of the plaintiff, or by proof controvert the same, as upon a direct denial or avoidance. The pleadings herein provided for shall be made within such time as the court or judge shall direct, and they shall be construed and have the same effect as in an action."

Section 1422 provides:

"If it appear that the party detained is illegally imprisoned or restrained, judgment shall be given that he be forthwith discharged; otherwise judgment shall be given that the proceeding be dismissed and the party remanded."

Now appellee United States Marshal duly made his return (page 43 Transcript) to the Writ of Habeas Corpus, to which said return he attached a copy of the judgment of the Justice's Court. He also attached to said return a copy of the District Court's order dismissing the appeal and confirming the judgment of the Justice's court. From the face of appellee's return to the Writ, so made as aforesaid, it appears that this appellant was then and there held BY VIRTUE OF THE LEGAL JUDGMENT OF A COMPETENT TRIBUNAL OF CRIMINAL JURISDICTION, to-wit, the judgment of the Justice's court for Sitka Precinct, as affirmed by the District Court at Juneau. It appeared that appellant was legally detained in custody. According to section 1399, just cited, persons so imprisoned or restrained are not allowed to prosecute the Writ. Now this return of the Marshal to the Writ was not conclusive upon appellant. Under section 1419, Compiled Laws of Alaska, he could have, if he still desired to show that such imprisonment or restraint was unlawful, or that appellant was entitled to his discharge, controverted any of the

material facts set forth in the return of the writ by replication, verified as in an action. Whereupon, had he so controverted the return, it was the duty of the court "to proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint, or against the same, and to dispose of the party as the law and justice of the case may require." Again, the appellant could have, under section 1420, Compiled Laws of Alaska, demurred to the return, * * * or by proof controverted the same, as upon a direct denial or avoidance. What did appellant do when the return was made in the District Court? Appellant's Bill of Exceptions (page 51 Transcript) shows the only action taken by the appellant. The Bill of Exceptions in this particular is as follows:

"* * * and thereupon the said defendant filed his Return to the Writ of Habeas Corpus issued in this case, which return on being read by the attorney for the said petitioner was excepted to by him for said petitioner and an oral denial was made to so much thereof as alleged that the petitioner voluntarily surrendered himself into the custody of the said marshal and voluntarily yielded to the restraint and imprisonment complained of in the petition herein for the writ, and thereupon the judge of this court asked if petitioner desired to offer any testimony in denial thereof, and whereupon

counsel for the petitioner asked leave of the Court to introduce testimony in denial thereof, and leave of the Court being had called George D. Beaumont and Harry Mabry as witnesses who being first duly sworn gave the following testimony."

The testimony is set out in full at pages 52 to 56 inclusive of the Transcript of Record. Appellee maintains that the evidence so offered, and the record, indicates that appellant voluntarily surrendered himself into custody, and for the purpose of bringing this habeas corpus proceeding. But be that as it may, it clearly appears that the appellant did not object to the validity of the judgment as affirmed by the District Court set forth in the return. Nor did he question the sufficiency of the return or the sufficiency of the judgment under which he was held, copies of which were attached to the return. The only objection he made was as to whether or not appellant voluntarily surrendered himself into custody. In this connection be it remembered that during all this time appellant was enlarged upon his bail bond, in which said bond he had promised and agreed to abide by and perform the orders and judgment of the District Court or forfeit \$1200.00.

THE RETURN TO THE WRIT SHOWED A COMMITMENT UNDER JUDICIAL PROCESS AND MUST BE HELD CONCLUSIVE AND THE

JUDGMENTS UNDER WHICH APPELLANT WAS HELD, AS SET FORTH IN THE RETURN, MUST BE HELD VALID AND SUFFICIENT BECAUSE UNCONTROVERTED. There was no issue for the District Court to try except that controverted point, to-wit, whether or not appellant voluntarily surrendered himself into custody. Appellant did not demur, answer, or otherwise controvert the facts set up in appellee's return to the writ, except as just stated. It did "appear on the return that the prisoner was in custody by virtue of an order * * * of a court legally constituted, and issued by an officer in the course of judicial proceedings before him authorized by law." Appellant was not entitled to be discharged under any of the provisions of section 1413, Compiled Laws of Alaska, because it did not appear on the uncontroverted return that:

"First. The jurisdiction of such court or officer had been exceeded, either as to matter, place, sum, or person;

"Second. The original imprisonment was lawful, yet by some act, omission, or event which has taken place afterward the party has become entitled to be discharged;

"Third. The order or process is defective in some matter of substance required by law, rendering such process void;

"Fourth. The order or process, though in proper form, has been issued in a case not allowed by law;

"Fifth. The person having the custody of the prisoner under such order or process is not the person empowered by law to detain him; or,

"Sixth. The order or process is not authorized by any judgment of any court nor by any provision of law."

The court had no alternative but to remand the appellant under the provisions of section 1412, Compiled Laws of Alaska. According to the provisions of section 1399, Compiled Laws of Alaska, appellant should not have been allowed to prosecute the writ.

The authors of *Habeas Corpus*, 29 CJ 164, section 188, on this point say:

"By statute, the law everywhere now is that the return is not conclusive, and the petitioner or person restrained may not only set up new matter in confession and avoidance, as at common law, but he may deny any of the facts set forth in the return. In the absence of a denial, averments of facts in the return will be taken as true and conclusive, *regardless of the allegations contained in the petition*, and the only question for determination is whether or not the facts stated in the return, as a matter of law, author-

ize the restraint under investigation * * *” and numerous cases cited.

The authors of *Habeas Corpus*, 10 Stand. Encyc. Proc. 933 say:

“When the petitioner desires to deny the allegations of fact in the return he should do so by filing an answer or traverse, and not by the production of a mere affidavit. If no such traverse or answer be filed and the return is sufficient, the prisoner must be remanded. THE FACTS ALLEGED IN THE RETURN ARE TAKEN AS TRUE UNLESS THEY ARE PROPERLY TRAVERSED.” And numerous authorities cited.

Congress borrowed the Alaska law of Habeas Corpus from Oregon. The adoption by Congress of a state statute includes the adoption of the construction previously given to it. A statute taken from another state will be presumed to be taken with the meaning it had there. *Stell v. Dessimore*, 3 Alaska, 395. Let us see what construction the Supreme Court of Oregon has given to these statutes.

The Supreme Court of Oregon in the case of *Ex parte Stacey*, 75 Pac. 1061, says:

“The bill of exceptions does not disclose that Stacey interposed a plea of not guilty to the information, but, as the return to a writ of

habeas corpus is traversable in this state, (B. & C. Comp, section 640) (identical with section 1419 Compiled Laws of Alaska) if such plea was not entered it was his duty to show that fact, and not having done so, it will be presumed that the court had jurisdiction of his person. *Ex parte Howe*, 26 Or. 181, 37 Pac. 536."

The Oregon Supreme Court in the case of *In re Howe*, 37 Pac. 536, (1894) in construing the provisions of their statute providing for answer or traverse to a return to writs of habeas corpus, says:

"The only question on this appeal arises on a demurrer to the return of the officer. *Merriaman v. Morgan*, 7 Or. 68; *Barton v. Saunders*, 16 Or. 51, 16 Pac. 921. From the return it appears that the petitioner is detained by virtue of five separate commitments from a court of competent jurisdiction, regular and valid on their face; and the presumption is therefore in favor of the legality of such imprisonment, and the burden of impeaching its legality is on the petitioner. Church Hab. Corp. (2d Ed.) section 236. This return was, by virtue of section 628 of the statute, (section 1419 Compiled Laws of Alaska identical) open to denial, or its justification to the sheriff might be controverted by the allegation of any fact showing either that the imprisonment was unlawful, or that the petitioner was entitled to be released. In such

case the statute requires the court to proceed in a summary way to hear such evidence as may be produced in support of or against the imprisonment or restraint and dispose of the case as law and justice may require. Under this provision of the statute the petitioner could have alleged and shown, if the facts warranted, that the several commitments were for the same offense; but, not having done so, this court cannot indulge in any presumptions to that effect. Each of the charges against the petitioner may have been for a separate violation of the statute, and there is nothing in the proceedings to show that they were not. From these conclusions it follows that the judgment of the court below must be affirmed."

In the case of *Lane v. Word*, Sheriff, 130 Pac. 741, decided by the Supreme Court of Oregon in construing statutes identical with those of Alaska, Burnett, J., says:

"At the hearing before this court, the defendant objected, as thus stipulated he might, contending that the validity of the return itself, that document not having been traversed, was the only question for us to determine. Although the circuit court may have considered the judgment roll referred to as a part of the sheriff's return, uncontradicted as it was, the circuit court rendered the proper judgment. The only purpose that could be served by the judgment

roll referred to was to prove some controverted allegation in the return; but as we have seen, no traverse was made on anything alleged in the return, and hence there was no need to use the judgment roll as evidence or for any other purpose.

"Section 639, L. O. L., (identical in phraseology with section 1410 Compiled Laws of Alaska) states that: "The court or judge before whom the party shall be brought on such writ shall immediately after the return thereof proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party whether the same shall have been upon commitment for any criminal or supposed criminal matter or not."

"Section 648, L. O. L., (identical in phraseology with section 1419 Compiled Laws of Alaska) states that: "The plaintiff in the proceeding on the return of the writ may by replication verified as in an action controvert any of the material facts set forth in the return or he may allege therein any fact to show either that his imprisonment or restraint is unlawful or that he is entitled to his discharge and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint or against the same and to dispose of

the party as the law and justice of the case may require.

"Having before us then an unchallenged return, the only question for us to determine is whether or not it shows sufficient facts to retain the petitioner in custody * * * On account of the state of the pleadings before us, we cannot inquire into the main question argued in the hearing. The judgment of the court below (dismissing writ) is affirmed."

In the case of *Stratton U. S. Immigrant Inspector v. Rudy*, 176 Fed. 727, 101 CCA 223, the court says at page 730:

"The transcript shows no traverse either by pleadings or evidence of facts recited in the return of the immigration officers to the writ of habeas corpus. The return on a writ of habeas corpus reciting facts imports verity until impeached. *Crowley v. Christensen*, 137 U. S. 86, 94, 11 Sup. Ct 13, 34 L. Ed. 620. The return shows a state of facts under which Mrs. Rudy was lawfully held in custody; and, without evidence controverting the said facts, the court erred in releasing her from the custody of the immigration officers. See *Japanese Immigrant case* 189 U. S. 86, and *Chin Yow v. U. S.* 208 U. S. 8. The decree appealed from is reversed, and the cause is remanded with instructions to enter judgment dismissing the writ, and return-

ing Mrs. Rudy to custody of immigration officers."

The return as made by appellee in this case shows on its face legal justification for appellant's detention. It follows that the District Court properly dismissed the writ and remanded this appellant.

(b) BUT EVEN IF ALL THE FOREGOING CONTENTIONS WERE UNSOUND APPELLANT WOULD NOT BE ENTITLED TO RELIEF ON THE MERITS OF THIS CASE.

Going now to the merits of appellant's case made by this habeas corpus proceeding, if it can be held that he is entitled to prosecute such remedy in this case, let us inquire into the record and determine whether his contentions are well taken. We maintain they are not.

It is elementary that where restraint is under legal process habeas corpus is not designed to inquire into mere errors and irregularities which do not render the proceedings void.

The authors of *Habeas Corpus*, 12 Ruling Case Law at page 1192 say:

"Proceedings on habeas corpus to obtain release from custody under final judgment being in the nature of a collateral attack, the writ deals only with such radical defects as render

the proceeding or judgment absolutely void, and cannot have the effect of an appeal, writ of error, or certiorari, for the purpose of reviewing mere error and irregularities in the proceedings leading up to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed, nor are mere defects in the judgment or sentence itself, or irregularities after it is pronounced, reviewable in this manner. If the court has jurisdiction of the person and the subject matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. THIS RULE APPLIES TO INFERIOR COURTS, AND THE JUDGMENT OF AN INFERIOR COURT, SUCH AS A POLICE COURT, MAYORS, MAGISTRATES, OR JUSTICES, HAVING JURISDICTION CONFERRED BY LAW TO TRY AND DISPOSE OF A CRIMINAL CASE, IS AS CONCLUSIVE AND RESTS UPON THE SAME BASIS, WHEN THE JURISDICTION HAS ATTACHED, AS THE ADJUDICATION OF ANY OTHER COMMON LAW COURT. This rule that mere errors or irregularities are not ground for habeas corpus has been held to apply though no appeal or writ of error will lie to the judgment." An authorities

cited. Se also note 87 A. S. R. 198 for full discussion as to rule in justice's courts.

The authors of *Habeas Corpus*, 29 CJ 27, section 19, say:

"Where the restraint is under legal process, mere errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus."

And further at page 29, note 6 (a) and (b):

"This is especially true after the judgment has been affirmed by the supreme court," and "dismissal of appeal does not change the rule."

In the case of *Ex parte Siebold*, 100 U. S. 371, 375, 25 L. Ed. 717, the Supreme Court of the United States laid down the rule:

That "the only ground on which this court, or any court, without some special statute authorizing it, will give release on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the prisoner or the cause, or some other matter rendering the proceedings void."

And in the case of *In re Coy*, 127 U. S. 731, 757, 8 Sup. Ct. 1263, 1271, 32 L. Ed. 274, Mr. Justice Miller, speaking for the Court said:

"An imprisonment under a judgment cannot

be unlawful unless that judgment is an absolute nullity."

In *Kaizo v. Henry*, High Sheriff of Hawaii, 211 U. S. 146, the United States Supreme Court lays down the following rule:

"No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the court or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not in this manner usurp the functions of a writ of error." Citing:

Ex parte Parks, 93 U. S. 18;
Ex parte Siebold, 100 U. S. 371, 375;
Ex parte Yarbrough, 110 U. S. 651, 653;
Ex parte Wilson, 114 U. S. 417;
In re Delgado, 140 U. S. 586;
U. S. v. Pridgeon, 153 U. S. 48, 59, 63;
Andrews v. Swartz, 156 U. S. 272, 276;
Riggins v. U. S., 199 U. S. 547;
Filts v. Murphy, 201 U. S. 123;
Valentina v. Mercer, 201 U. S. 131.

In the case of *Ex parte Moran*, 144 Fed. 594, Sanborn, Circuit Judge, speaking for the court says at page 604:

"The writ of habeas corpus does not challenge the regularity or legality of the action of a court in the trial or procedure which results in the imprisonment of a petitioner. It may not perform the office of a writ of error or of an appeal. It presents but two questions for consideration: Did the court which rendered the judgment or made the order of imprisonment have jurisdiction of the subject matter and of the person? And did the court in the course of the proceeding which resulted in the judgment exceed its jurisdiction? *Ex parte Parks*, 93 U. S. 18, 23; 23 L. Ed. 787; *Ex parte Siebold*, 100 U. S. 371, 375, 25 L. Ed. 717. See also note to *Ex parte Robinson*, L. R. A. 1918B 1160.

And in denying an application for a writ of habeas corpus by one convicted in the police court of the District of Columbia, the United States Supreme Court in the case of *In re Gregory* (1911) 219 U. S. 212, 55 L. Ed. 188, 31 Sup. Ct. 143, said:

"The only question before us is whether the police court had jurisdiction. A habeas corpus proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constitute a crime, that is to say, whether the court properly applied the law, if it be found that court had jurisdiction to try the issues and render the judgment."

Ex parte Kearney, 7 Wheat. 38;
Ex parte Watkins, 3 Pet. 193;
Ex parte Parks, 93 U. S. 18;
Ex parte Yarbrough, 110 U. S. 651;
Gonzales v. Cunningham, 164 U. S. 612;
In re Eckert, 166 U. S. 481;
Storti v. Massachusetts, 183 U. S. 138;
Dimmick v. Tompkins, 194 U. S. 540;
Hyde v. Shine, 199 U. S. 62, 83;
Whitney v. Dick, 202 U. S. 132, 136;
Kaizo v. Henry, 211 U. S. 146, 148.

And further in the case entitled *Matter of Gregory*, 219 U. S., at page 218, the court says in conclusion:

“The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for the writ of habeas corpus must be denied.”

Section 1399, Compiled Laws of Alaska, provides that in certain cases the writ shall not be allowed:

“Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, shall not be allowed to prosecute the writ.”

Section 1413, Compiled Laws of Alaska, provides in what cases the writ SHALL BE ALLOWED:

"If it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner shall be discharged in either of the following cases:

"First. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

"Second. When, though the original imprisonment was lawful yet by some act, omission, or event which has taken place afterwards the party has become entitled to be discharged;

"Third. When the order or process is defective in some matter of substance required by law, rendering such process void;

"Fourth. When the order or process though in proper form, has been issued in a case not allowed by law;

"Fifth. When the person having the custody of the prisoner under such order or process is not the person empowered by law to detain him, or;

"Sixth. When the order or process is not authorized by any judgment of any court nor by any provision of law."

Now the return made by appellee United States Marshal to appellant's Writ of Habeas Corpus is fully set out at page 43 of the Transcript and shows conclusively, the same not being controverted except as to appellant's voluntarily surrendering himself into custody, that appellant was held by virtue of a judgment of the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, as affirmed by the District Court at Juneau after appellant's pretended appeal was dismissed. The question now to be determined is that of jurisdiction only, and whether said Commissioner's proceedings and judgment are absolutely void. We are not concerned with mere errors and irregularities in the proceedings and judgment.

It is not disputed that the United States Commissioner's Court, at Sitka, is legally constituted and that such Commissioner acting in his capacity of ex-officio Justice of the Peace has trial jurisdiction of misdemeanors defined by the Alaska Bone Dry Act, (Section 28, Alaska Bone Dry Act) including illegal possession of intoxicating liquors, and has authority to render judgments and sentence offenders for such violations.

Section 28 of the Alaska Bone Dry Act pro-

vides that "in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury." The Act does not provide the penalty for such perjury. Perjury being a felony in Alaska would be prosecuted under indictment returned by a grand jury. All other crimes defined by the Act are misdemeanors and within the trial jurisdiction of United States Commissioner's Courts acting in their capacity of ex-officio Justices of the Peace. Even though no presumption is in favor of the regularity of proceeding in an inferior court the rule is as firmly established that no irregularity will be presumed to exist. Appellant by inferring that this prosecution might have been for the crime of perjury is presuming irregularity because the proceedings in the Justice's court could not by any examination of the record be held to be for perjury, nor for bind over proceedings as in felony cases. The Justice's court has trial jurisdiction over all other crimes denounced by the Act. In this case the court had jurisdiction over the subject matter. Let us see whether or not the court had jurisdiction over appellant's person.

The warrant of arrest, erroneously called "bench warrant" by the appellant, is printed at page 16 in the Transcript of Record. It is substantially in the form prescribed by section 2384 of the Code of Criminal Procedure, ex-

cept that the crime of which the appellant is accused is therein designated as "violating the Alaska Bone Dry Act. Pub. No. 308," and to this defect the appellant now takes exception. The appellant was taken into custody by the marshal on the date of the issuance of the warrant, and as appears from the transcript of record from the Commissioner's Court, (Transcript page 26) on being brought before the Commissioner, entered a plea of not guilty, and demanded a jury trial, and was represented by attorney, and was tried and found guilty. NO OBJECTION WAS MADE TO THE WARRANT OF ARREST OR THE INFORMATION, OR TO ANY PART OF THE PROCEEDINGS OR JUDGMENT. The record further shows that after conviction appellant gave his bail bond on appeal (page 23 Transcript) and was released from custody by order of the Commissioner (page 24 Transcript). He served and filed his Notice of Appeal and attempted to appeal to the District Court from the Justice's judgment, ALL WITHOUT ANY OBJECTION TO THE PROCESS OR PROCEEDINGS. Furthermore, appellant is not now held, nor was he so held when he brought this habeas corpus proceeding, upon the original warrant of arrest. It cannot now be asserted that the Commissioner's court did not have jurisdiction over appellant's person. He waived all defects in this warrant, if any there were, by submitting to the jurisdic-

tion of the court without objection. 16 CJ 310, sections 551 and 552.

But even though the defendant had not waived any of the alleged defects in this warrant of arrest, it is sufficient in this kind of a proceeding. At least it is not void. The authors or *Criminal Law*, 16 CJ 306, section 543, on this point say:

“Except in cases where the warrant serves as an indictment or information, technical accuracy is not required in the description of the offense. The essential point is that accused should be able to understand from the description what charge he has had to meet, and a warrant which fully informs him on this point is generally speaking sufficient. Thus, as a general rule, it is sufficient to describe the offense charged by giving its name; and it is never necessary to set forth the circumstances of the offense or the details of its commission, or the evidence by which it is proposed to support the accusation. **THERE IS AUTHORITY TO THE EFFECT THAT IT NEED NOT EVEN CONTAIN A SPECIFICATION OF THE PARTICULAR OFFENSE;** but the better opinion, as well as the general and approved practice, is that it should state the offense with convenient certainty; that it should not be for felony generally but should show the special nature of the felony.”

See also *Criminal Law*, 16 CJ 306, section 542,

as to sufficiency in the description of the offense.

The case of *State v. Cupton*, 166 N. C. 257, 80 S. E. 989 holds that the affidavit and warrant should be construed together. If that is done in this case it clearly appears that appellant was arrested for having moonshine whisky in his possession in violation of the Alaska Bone Dry Act.

The case of *State v. Potter*, 23 S. C. L. 296, holds that a warrant commanding an officer to arrest one on a charge of felony, without designating the species of felony, is not void. The description of the offense for which appellant was taken into custody under this warrant is even more definite than had it been designated as simply a misdemeanor.

In *Martin v. State*, 32 Ark. 124, 130, the Court said:

"The statute requires the warrant of arrest, in general terms, to name or describe the offense charged to have been committed, and gives a form for such warrant. *Cantl's Digest*, sec. 1669, and notes. But we think a warrant commanding an officer to arrest a person on a charge of felony, without designating the species of felony, would not be void, and that the officer could not legally refuse to arrest the accused, and would be liable to indictment if

he permitted him to escape by negligence."

Even though it should be held that appellant did not waive the alleged defect by his general appearance without objection, this warrant is at most voidable and not void and cannot be ground for habeas corpus, and does not invalidate the proceedings in the Commissioner's court.

THE INFORMATION IS SUFFICIENT. Turning now to the first pleading on the part of the government (page 15 Transcript) we find that it is entitled a complaint. But the name by which such a pleading is called does not in fact determine its character. If it was entitled a judgment that would not make it a judgment in fact. What the pleading is called is immaterial, at least it does not make the pleading void. At most it is an irregularity which cannot be reached by habeas corpus proceedings. Prosecutions for violations of the Alaska Bone Dry Act, according to section 27 shall be by certain named officers, including prosecuting attorneys and their deputies. Section 28 of the Act provides:

"That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and

said United States District Attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated."

It appears (page 15 Transcript) that said so-called complaint was filed by a proper officer, to-wit, an assistant United States Attorney. It is duly verified and discloses on its face that it is entitled in the proper court and charges a crime over which the justice had trial jurisdiction. The mere fact that it is called a complaint is not a jurisdictional defect rendering it void. It is an information in fact. Chapter 31 of The Compiled Laws of Alaska, and section 2379, defines an information as follows:

Section 2379. "That an information is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime."

Section 2380. "That a magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime."

The first pleading on the part of the government, called a complaint, substantially conforms to the requirements of the chapter and sections quoted. In the case of *Booth v. U. S.* 197 Fed. 284, an Alaska case taken to this court,

a form of an information is set out in full, and upheld, and the first pleading on the part of the government in this case, substantially conforms to the form of information upheld in the Booth case. By going to trial without objection this appellant waived the irregularity, or error, if it existed, and he cannot now be heard on that point in this kind of a proceeding. The defendant was not prejudiced in the reference to a violation of "The Alaska Bone Dry Act, Pub. No. 308" without more specific reference to the law violated. He made no objection to the defect, if any existed. This court will take judicial notice of the fact that Alaska has a Bone Dry Act. The Abbatte case, (*Abbatte v. U. S.*, 270 Fed. 737) in referring to the Alaska Bone Dry Act and the National Prohibition Act, reads in part as follows:

"In brief, we think, that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the States, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaskan Act than it does the state acts."

See also *Koppitz v. U. S.* 272 Fed. 96.

Numerous Federal decisions refer to the VOLSTEAD ACT and the NATIONAL PROHIBITION ACT. The ALASKA BONE DRY ACT is the popular name of Alaska's prohibition act. So it is of

common knowledge what is intended when we speak of the ALASKA BONE DRY ACT. Section 1 of the Alaska Bone Dry Act provides that it shall be unlawful to possess intoxicating liquor. This appellant is charged with wilfully and unlawfully having intoxicating liquor, to-wit, moonshine whisky, in his possession in violation of the Alaska Bone Dry Act. Appellant certainly knew what the charge was against him, and certainly he was not prejudiced in this particular, because in his Notice of Appeal (Transcript page 22) he recites:

“* * * defendant * * * appeals * * * from the judgment * * * wherein the said defendant was convicted of a violation of the ALASKA BONE DRY LAW, to-wit, the possession of intoxicating liquor in violation of the said law * * *”

His description of the Act under which he was convicted, and his description of the crime of which he was convicted, is no more definite or exact than is charged in the information and warrant in this case, if as definite, because the information describes the intoxicating liquor as moonshine whisky, the possession of which could not under any circumstances be lawful. And certainly it demonstrates clearly that said appellant was not prejudiced in respect to his knowledge as to the nature of the crime charged against him, and for the commission of which

he was convicted. This appellant is rather inconsistent now, even to the point of estoppel, in raising this point in this kind of a proceeding.

This information would still be valid even though the reference to "Alaska Bone Dry Act Pub. No. 308" was omitted entirely. Under the authority of the Vedin case (*Vedin v. U. S.* 257 Fed. 550) from Alaska, decided by this court:

"The statute on which an indictment is found is determined as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute." Citing:

Williams v. U. S. 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509;
U. S. v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207;
Wechsler v. U. S. 158 Fed. 579, 86 CCA 37;
U. S. v. Sandefuhr (DC) 145 Fed. 49;
U. S. v. Wood (DC) 168 Fed. 438;
Ex parte King (DC) 200 Fed. 622;
Commonwealth v. Peto, 136 Mass. 155.

Now does the information in this case fail to state a crime? The information (page 15 Transcript) is in the following words:

(Caption and Title)

"Complaint for Violation of the Alaska Bone

Dry Act—Pub. No. 308. Harry Mabry is accused by H. D. Stabler in this complaint of the crime of possessing intoxicating liquor, committed as follows, to-wit: The said Harry Mabry in the District of Alaska, and within the jurisdiction of this court, did wilfully and unlawfully, on the 1st day of December, 1921, at Sitka, Alaska, and in S. S. Thornton's residence near the Russian Greek Church at Sitka, Alaska, then and there have in his possession intoxicating liquor, to-wit, moonshine whisky, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

(Signed) H. D. STABLER,
Asst. U. S. Attorney.

United States of America,
Territory of Alaska, ss.

I, H. D. Stabler, being first duly sworn, depose and say that the foregoing complaint is true.

H. D. STABLER.

Subscribed and sworn to before me this 9th day of January, 1922.

R. W. DEARMOND,
Ex-officio Justice of the Peace."

Appellant sets up for the first time in this habeas corpus proceeding that the complaint does not state facts sufficient to constitute a

crime. He alleges that the government did not negative the exceptions in the Act. That proposition may be answered in three ways:

First. One cannot lawfully possess "moonshine whisky" in the Territory of Alaska, there being no exception in the Act to such illicit whisky.

"It is not necessary to negative any exception or proviso which, if established, would not excuse or protect defendant in respect to the particular offense with which he is charged." 23 Cyc. 238-21.

The only exceptions defined by the Alaska Bone Dry Act are pure alcohol and wine for sacramental purposes under certain regulations. This information does not charge appellant with the possession of pure alcohol or wine; these being the only two exceptions known to the Act, the information does not fail to state a crime through failure to negative these exceptions.

Second. It is not necessary to negative the exceptions in an information for illegal possession of intoxicating liquor under the wording of the Alaska Bone Dry Act.

The exceptions are contained in sections 2 to 12 inclusive and provide for legal possession of pure alcohol and wine for certain purposes under certain regulations. According to the very wording of the enacting section of the Act, to-wit,

section 1, it is necessary to refer to these other sections to determine what, if any, exceptions there are to the crimes defined in said section 1.

It is not necessary to negative exceptions such as legality of manufacture, possession, or transportation, such matters, if they exist, may be proved in defense under a plea of not guilty.

In the case of *United States v. Nelson*, 29 Fed. 202, 209, decided in the District Court, D. Alaska, 1886, objection was made that the indictment was defective in that it did not negative the exceptions in the statute. The statute read as follows:

“The importation, manufacture, and sale of intoxicating liquor in said district, EXCEPT FOR MEDICINAL, MECHANICAL, AND SCIENTIFIC PURPOSES, is hereby prohibited.”

Judge Dawson said:

“When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but, if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them to avail himself of their benefit. *Kline v. State*, 44 Miss. 318. Where provisos or exceptions are contained in distinct and independent clauses of the

statute upon which an indictment is founded, it is unnecessary to allege in the indictment that the party indicted is not within the exceptions. *State v. Cassady*, 52 N. H. 500. The allegation in the indictment is that the defendant did sell certain distilled liquors, therein described, contrary to the statutes of the United States. Now, before there could be legal sale of liquors, the law requires that the party selling must have procured a license from the governor of the territory, issued upon evidence satisfactory to that officer that the sale of such liquor would be strictly in accordance with the requirement of the statute, as provided for and required in the President's regulations. Prof. Wharton says, (Crim. Ev. section 342) "When the non-existence of the license is not averred in the indictment, and when the license is particularly within the knowledge of the party holding it, the burden is on him to produce such license in all cases in which the existence of the license is in question." If this defendant has complied with the law, and procured a license from the governor, surely he knows it; and I am clearly of opinion that this is one of that class of cases in which the burden is shifted on the defendant, and, upon the general allegation that he sold contrary to the statute, he must show that he is within the exceptions of the statute."

The above case was appealed to the Circuit

Court D. Oregon and the indictment upheld in the case of *Nelson v. U. S.*, 30 Fed. 112. Deady, J., speaking for the court at page 116 says:

"There are cases which decide that an exception like this should be negatived in the indictment. But in my judgment they are more distinguished for verbal dialetics, than good sense, and are better calculated to puzzle and pervert than to promote the administration of justice. As a rule, an exception in a statute by which certain particulars are withdrawn from or excepted out of the operation of the enacting clause thereof, defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed close to or remote from such enacting clause. And, whenever a person accused of the commission of such a crime claims to be within such exception, it is more logical and convenient that he should aver and prove the fact than that the prosecutor should anticipate such defense, and deny it. * * * In my judgment the indictment is sufficient in this particular. The purpose of the statute is to prohibit the sale of intoxicating liquors in the district of Alaska generally, and the exception in favor of sales for particular purposes need not be noticed in an indictment for its violation."

In the case of *Shelp v. U. S.* (CCA Ninth Circuit, from Alaska) 81 Fed. 696, Hawley, District

Judge, speaking of an indictment which did not negative the exceptions in a statute reading:

“* * * the importation, manufacture, and sale, of intoxicating liquors in said district, EXCEPT FOR MEDICINAL, MECHANICAL, AND SCIENTIFIC PURPOSES IS HEREBY PROHIBITED * * *”

says:

“In *U. S. v. Nelson*, 29 Fed. 202, 209, and in the same case on writ of error to the circuit court of Oregon, 30 Fed. 112, 115, a similar indictment, which did not negative the exceptions in the statute, was held to be sufficient.

“The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proven by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its

locality, that determines the question whether it should be stated in the indictment or not."

State v. Ah Chew, 16 Nev. 50, 54, and authorities there cited;

U. S. v. Cook, 36 Fed. 896;

U. S. v. Cook, 17 Wall. 168, 173;

State v. Van Vliet (Iowa) 61 N. W. 241;

Bell v. State (Ala.) 15 Sou. 557.

"The court did not err in refusing the motion in arrest of judgment."

In the case of *Davis v. U. S.* 274 Fed. 928, Gilbert, C. J. speaking for the Court said:

"It is contended that it (indictment) is fatally defective in that it fails to allege that the liquor, the transportation of which was the object of the conspiracy, was not to be used for non-beverage purposes, under the provisions of section 3 of title 2 of the Act. The plaintiff's in error cite authorities to the proposition that where a statute in defining an offense "contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused is not within the exception," citing 14 R. C. L. 186. But the text writer so quoted goes on to say: "On the other hand, if the language of the section defining the offense

is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference as the matter contained in the exception is matter of defense and must be shown by the accused."

"We think the present case comes clearly within the rule last quoted * * *. The case clearly comes within the rule of this court's decisions in *Shelp v. U. S.*, 81 Fed. 694, 26 CCA 570; and *Hockett v. U. S.* (CCA) 265 Fed. 588."

The above case is followed by this court in the case of *Massey v. United States*, 281 Fed. 295.

In a recent decision of the United States Supreme Court, entitled *McKelvey et al. v. United States*, 43 Sup. Ct. 132, Mr. Justice Van Devanter said:

"One ground of objection is that the indictment contains no showing that the accused were not within the exception made in the proviso to section 3. This is not a valid ground. By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere,

and that it is incumbent on one who relies on such an exception to set it up and establish it. *Schlemmer v. Buffalo, Rochester & Pittsburg Ry Co.*, 205 U. S. 1, 10, 27 Sup. Ct. 407, 51. L. Ed. 681; *Javierre v. Central Altamaria*, 217 U. S. 502, 508, 30 Sup. Ct. 598, 54 L. Ed. 859, and cases cited."

Other authorities in point are:

Hockett v. U. S. 265 Fed. 588;
22 Cyc 344-D;
23 Cyc 237 (IV).

Third. Appellant did not raise objection for failure to negative any exception in the trial court and he cannot raise the question on appeal. *Ames v. Farrelly*, 121 Fed. 820.

Appellee maintains that the pleading did not fail to state a crime as alleged in appellant's brief.

There is one other pertinent feature to this case which might be properly noticed here. That is: our statute, section 2558, Compiled Laws of Alaska, providing for appeals from Justice's Courts in criminal actions provides:

"That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the

justice's court. THE APPELLATE COURT HAS THE SAME AUTHORITY TO ALLOW AN AMENDMENT OF THE PLEADINGS ON AN APPEAL IN A CRIMINAL ACTION THAT IT HAS ON AN APPEAL IN A CIVIL ACTION."

Upon appeal the government could have corrected all these alleged defects. By this habeas corpus proceeding, if these questions can be raised, the government would be prejudiced by being deprived of an opportunity to amend the complaint in these particulars. If permitted to do so a defendant could by bringing habeas corpus proceedings, instead of appeal, avoid altogether the effect of section 2558. This, we maintain, is not permissible.

THE JURY VERDICT IN THIS CASE WAS VALID. Appellant further contends that the verdict of the jury was not sufficient in that it failed to state that the defendant was guilty as charged in the complaint or information, but stated only that the jury found appellant guilty. The verdict recites the court and cause and is sufficient in that respect. The Supreme Court of the United States in the case of *Statler v. U. S.*, 157 U. S. 277, uses the following language:

"It is settled, beyond question, that a verdict of guilty, without specifying any offense, is general and is sufficient and is to be understood as referring to the offense charged in the indict-

ment." Citing *St. Clair v. U. S.*, 154 U. S. 154. *Bond v. The People*, 39 Ill. 26; *State v. Jurche*, 17 La. Ann. 71; *State v. Curtis*, 6 Ired. (Law) 247; *State v. Fuller*, 34 Conn. 280; *State v. Morris*, 104 N. C. 837.

Bishop's New Criminal Procedure, page 869, section 1005a, is substantially to the same effect, the words being:

"A finding of lay people need not be framed under the strict rules of pleading or after any technical form. Any words which convey the idea to the common understanding will be adequate, and all fair indictments will be made to support it. If the jury mean to convict the defendant of everything alleged, any expression of the idea, however brief, will be adequate. The full and orderly phrase is "guilty in manner and form as charged against him in the indictment" and it is practically to be chosen. But the single word "guilty" set in a proper connection, will suffice as conveying the whole idea."

The authors of *Habeas Corpus*, 29 CJ 48, section 40 says:

"Irregularity, error, or insufficiency of the verdict will not support a writ of habeas corpus."

Appellee maintains that the verdict in this case was sufficient.

THE JUDGMENT WAS VALID AND SUFFICIENT. The further assertion is made by appellant that the judgment is void because not in compliance with section 2539, Compiled Laws of Alaska. This section provides that when a judgment of conviction is given upon a plea of guilty or upon a trial, the justice must enter the same in the justice docket substantially as follows:

"Justice's Court for the Precinct of , District of Alaska, Division No.

"The United States of America v. A. B. (Day of month and year.)

"The above-named A. B. having been brought before me, C. D., a Commissioner and ex-officio justice of the peace, in a criminal action, for the crime of (briefly designate the crime), and the said A. B. having thereupon pleaded 'not guilty' (or as the case may be), and been duly tried by me (or by a jury, as the case may be), and upon such trial duly convicted, I have adjudged that he be imprisoned in the county jail days and that he pay the cost of the action, taxed at dollars (or that he pay a fine of dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding days, as the case may be).

C. D.,

"Comissioner and exofficio Justice of the Peace."

This form was substantially followed by the justice in the judgment under consideration in all particulars except that, in designating the crime of which the defendant was convicted, it recites that the crime was a violation of the Alaska Bone Dry Act. Appellant contends that this does not designate any crime; that there may be several crimes charged under this Act and that the word "Alaska Bone Dry Law" in themselves, are meaningless as designating the crime, and that, therefore, the judgment of the justice is void as not being in compliance with the statute aforesaid.

It will be noted that the provisions of section 2539 refer to the entry in the justice's docket by the justice after the judgment is pronounced and refers merely to the ministerial act of the entry in the docket. Section 2535 of the Compiled Laws of Alaska provides that when the defendant pleads guilty or is convicted, either by the justice or the jury, the justice must give judgment thereon for such punishment as may be described by law for the crime. This judgment may be given orally and usually is. Section 2539 provides that when a judgment of conviction is given, the entry must be made substantially in the form prescribed.

Conceding, under this view of the Act, that the entry of the judgment by the justice did not substantially comply with the form prescribed,

would it render the judgment void? To this we should look to the whole record and from it we find that the defendant was convicted of a violation of section 1 of the Act referred to, in that he had in his possession, on December 1, 1921, intoxicating liquor, to wit, moonshine whisky, and sentence was made as prescribed by law.

But appellant contends that we can only look to the judgment as spread on the docket of the justice's court, and that no presumption can be had as to the justice's proceedings, a justice court not being a court of record. In this connection we now cite with approval, and indorse the written opinion of Hon. Thos. M. Reed, District Judge, heretofore given in said District Court in this cause, on this point, found at pages 78 to 88 inclusive in the printed Transcript.

In further support of the conclusion reached by the District Judge in his opinion, attention is respectfully invited to the fallowing additional authorities:

The authors of HABEAS CORPUS, 29 CJ 51, section 46, say:

“Judgments or orders which are merely erroneous or irregular are valid until reversed or set aside in a direct proceeding for that purpose, and are not subject to collateral attack. Habeas Corpus is a collateral attack on the judgment under which the prisoner is held. Accordingly,

where the trial court had jurisdiction of the offense and of the person of defendant, and power to render the particular judgment or sentence in proper cases, habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void but only voidable. But radical defects sufficient to render the judgment or sentence void on collateral attack, and only such defects, will sustain a writ of habeas corpus for the release of one held thereunder, subject to the rules elsewhere stated as to discretion in the issuance of the writ, and the existence of other remedies by way of trial, appeal, or otherwise."

We maintain that in this case appellant's proper remedy was appeal. As we have heretofore seen denial of the appeal, even though improper, is no ground for habeas corpus. Further, appellant could have prosecuted his appeal or error to the Circuit Court from the judgment of the District Court dismissing his pretended appeal and rendering judgment as theretofore rendered in the Justice's court. These remedies, available to appellant, he wholly failed and neglected to pursue. Instead he attacks the judgment and proceedings by habeas corpus. If it can be held that appellant is entitled to prosecute habeas corpus proceedings in this case, we are not herein concerned as to whether this judgment is voidable. Is the justice's judgment, as affirmed by the District Court, void?

Appellant maintains that the judgment is void for the reason that it does not sufficiently charge the crime of which he was convicted and sentenced.

Bailey on HABEAS CORPUS, volume I,
page 84, says:

“A judgment is not void ON THE GROUND OF NOT STATING THE OFFENSE OF WHICH THE PRISONER WAS CONVICTED, if it shows he was indicted for some offense and tried and convicted, and that the sentence passed upon him was one which the court had jurisdiction to pronounce for some offense of which he might have been convicted under the indictment * * *. The reason for the rule stated lies in the fact that a habeas corpus proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding and it should therefore be limited to cases in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction or by reason of the court having exceeded its jurisdiction in the premises.”

See also *Ex parte Thurston*, 233. Fed. 874; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546.

And the authors of *HABEAS CORPUS*, 12, R.C. L. 1207, section 26 say:

"The majority of the decisions, and especially those more in consonance with reason and justice, are averse to the discharge of criminals who have been duly convicted when the application for their release is by petition for habeas corpus based on some error, omission, or mistake in the judgment or sentence which might have been cured or corrected by writ of error or appeal. Thus it has been held that A COURT WILL NOT REVIEW IN HABEAS CORPUS PROCEEDINGS THE FAILURE OF A JUDGMENT TO STATE THE PARTICULAR OFFENSE OF WHICH THE DEFENDANT IS CONVICTED."

The Court of Appeals, First District, California, in the case of *Ex parte Morgensen*, 90 Pac. 1063, say:

"The validity of the judgment is also challenged. It is asserted that it fails to state the offense of which the petitioner was convicted. The judgment recites that the petitioner was duly convicted of the crime of violating Ordinance No. 130 of the town of Los Gatos, entitled, "An ordinance relative to the alcoholic liquor traffic in said town of Los Gatos, committed as charged in the complaint as aforesaid, that defendant Morgensen pay a fine of \$300 * * * This judgment contains a sufficient designation of the offense charged. *Ex parte Patrick Murray*, 43 Cal. 455. Petitioner remanded."

And the notes of *Koepke v. Hill*, 87 Am. State Rep. page 190, the authors say:

"A mere irregularity or informality in a judgment or sentence of conviction cannot be assailed on habeas corpus. Thus, a judgment of conviction not stating the particular offense of which the defendant is convicted (*Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *People v. Cavanagh*, 2 Parc C. Rep. 660) * * * is not subject to a collateral attack on habeas corpus."

In *Ex parte Gibson*, 31, Cal. 619, 91 Am. Dec 546, Sanderson, J., speaking for the Supreme Court of California, says at page 552:

"The only reason why, as I conceive, the judgment should show the offense is, that it may appear that the punishment inflicted is lawful, or in other words, that the court had not exceeded its power in that respect * * * The judgment in this case may be erroneous in not stating more definitely the offense of which the prisoner was convicted, but I am satisfied that it is not void." Prisoner remanded.

And speaking of judgments of inferior courts, the Supreme Court of Alabama, in the case of *Ex parte Adams*, 170, Ala. 105, 54 S. 501, holds:

"The courts will go to all reasonable lengths to support the judgments of inferior courts not of record which do not conform to prescribed

forms when assailed on habeas corpus." 29 CJ. 53, note 27 (A) *Church Hab. Corp.* section 296.

The authors of *HABEAS CORPUS*, 12 Ruling Case Law at page 1192 say:

"Proceedings on habeas corpus to obtain release from custody under final judgment being in the nature of a collateral attack, the writ deals only with such radical defects as render the proceeding or judgment absolutely void, and cannot have the effect of an appeal, writ of error, or certiorari, for the purpose of reviewing mere error and irregularities in the proceedings leading up to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed nor are mere defects in the judgment or sentence itself, or irregularities after it is pronounced, reviewable in this manner. If the court has jurisdiction of the person and the subject matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. THIS RULE APPLIES TO INFERIOR COURTS, AND THE JUDGMENT OF AN INFERIOR COURT, SUCH AS A POLICE COURT, MAYORS, MAGISTRATES, OR JUSTICES, HAVING JURISDICTION CONFERRED BY LAW TO TRY AND DISPOSE OF A CRIM-

INAL CASE, IS AS CONCLUSIVE AND RESTS UPON THE SAME BASIS, WHEN THE JURISDICTION HAS ATTACHED, AS THE ADJUDICATION OF ANY OTHER COMMON LAW COURT.”

Appellee maintains that the judgment in this particular is at most irregular, and is not void, and in a collateral attack on habeas corpus must be held sufficient.

THE JUDGMENT IS NOT VOID BECAUSE IT SENTENCES APPELLANT TO IMPRISONMENT FOR COSTS.

Appellant can not seriously contend that the whole judgment is void because it requires him to be imprisoned in jail until ‘such fine and costs be paid, not exceeding 300 days,’ because at page 56 of his printed Brief he says:

“So much of the justice’s judgment against defendant as requires him to be imprisoned in jail, or “in jail at Sitka,” or “in jail at Juneau, until such fine and costs be paid,” is void.”

His contention is that only part of the judgment is void. That also may be answered in two ways: First, the judgment does not provide imprisonment for costs; and second, even if it did that would not render the judgment void.

THE JUDGMENT DOES NOT PROVIDE IM-

PRISONMENT FOR COSTS. The judgment in this particular is in the exact words of the form of judgment provided by the Compiled Laws of Alaska for justice's courts. On the face of the judgment the justice did not exceed his jurisdiction imposing such sentence. Section 2299 of the Compiled Laws of Alaska provides:

"That a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which can not exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned."

The Justice's judgment (page 21 Transcript) reads:

" * * * I have adjudged that he be imprisoned in the jail at Sitka for four months and that he pay the costs of the action taxed at Ninety Three and 55-100 dollars, and that he pay a fine of Six Hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, NOT EXCEEDING THREE HUNDRED DAYS."

The words "and costs" in the above judgment providing for imprisonment until such fine

“and costs” be paid, are surplusage and may be rejected. The authors of CRIMINAL LAW, 16 CJ 1313, section 3095 on this point say:

“Words or phrases in the judgment which do not add to or change the mode of the punishment do not invalidate the sentence, but may be rejected as surplusage.”

The imprisonment for fine and costs in this case is limited to three hundred days, which, at \$2.00 per day would clearly cover the fine only. There is no intention on the part of the justice in rendering this judgment to imprison appellant for costs. If it had been such intention the number of days imprisonment would not have been limited to three hundred, but would have been enough days in addition to three hundred to cover the \$93.55 costs, or forty six days in addition to three hundred days. Therefore, the sentence must be construed to read: “and be imprisoned in such jail until such fine be paid, not exceeding three hundred days.” The words “and costs” are clearly surplusage. A judgment in a criminal case must be construed in its entirety. 16 CJ 1313, section 3094.

EVEN IF THE JUDGMENT DID PROVIDE IMPRISONMENT FOR COSTS THE JUDGMENT WOULD NOT BE VOID ON THAT ACCOUNT.

The authors of *HABEAS CORPUS* 12 R. C. L. 1208, section 27, say:

"Excessive or deficient sentence does not warrant relief by habeas corpus. The sentence is not void and may be corrected to that which the court has jurisdiction to pass * * *. With regard to the effect of excessive sentences as entitling the prisoner to relief on habeas corpus the principle is well established by the great weight of authority that, where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. In other words, the sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separate and may be dealt with without disturbing the valid portion of the sentence. Prior to the expiration of that part of the sentence that the court could legally impose, the prisoner will not, according to the prevailing rule, be discharged on habeas corpus, on the ground that the sentence is excessive."

The authors of *HABEAS CORPUS* 29 CJ 58, section 50, lays down the rule as to excessive sentence, as follows:

"It has been held broadly that a sentence imposing imprisonment for a longer term, or greater punishment, than authorized by law is

merely erroneous, but not void, and therefore not ground for relief by habeas corpus, but some of these cases can be supported without going so far, upon the ground that the application was premature, being made before the legal part of such sentence had been served or satisfied." There is also authority to the contrary. "But the present weight of authority supports the view that an excessive sentence is valid as to so much of as it is authorized by law and void only as to the excess, provided the sentence is severable so that the lawful part may be performed without performing the unlawful part * * * In accordance with this view habeas corpus will not lie to discharge a prisoner held under an excessive sentence before he has served or satisfied the authorized part of it, or the sentence on the valid and distinct judgment, but after the authorized part has been served or satisfied, further detention is illegal, and relief may be had by habeas corpus."

The case of *Wallace v. White*, 115 Me. 513, 99 A 452 holds:

"Imposition of costs, if in excess of jurisdiction, is severable and not ground for discharge before satisfaction of the valid part of the sentence."

And in the Alaskan case of *Booth v. U. S.* 197 Fed. 286, appealed to this court, the court says:

"The judgment, therefore, will be so modified as to strike therefrom that portion thereof which provides for imprisonment of the plaintiff in error until the costs be satisfied." "In other respects the judgment is affirmed."

See also *Jackson v. U. S.* 102 Fed 473, 42 CCA 452.

It clearly appears that appellant's objection on this point is not well taken. At most, that part of the sentence providing for imprisonment for costs is void, the remaining part of the sentence is valid. Furthermore this action would be premature now and would not lie until such time as appellant was actually imprisoned for costs.

There are only two other points in appellant's Brief which ought to be noticed before conclusion.

(1) Appellant's eleventh (11) assignment of error, at page 9 in his Brief reads as follows:

"That the order of said district court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this appellant was in excess of the jurisdiction of the said district court and its judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without jurisdiction and is null and void."

Appellant also refers to a bench warrant in his twelfth (12) assignment of error at the same page in his Brief (p. 9 Brief).

This bench warrant is not printed in the transcript, although a part of the record in the case. It is the contention of the appellee United States Marshal that this appellant voluntarily delivered himself up into custody according to the terms of his bail bond, in execution of the Justice's judgment as affirmed by the District Court. (See testimony pp 52-56 Transcript). He was not taken into custody on a bench warrant as referred to by appellant in his assignment of errors, for the reason that the said bench warrant was never delivered to said United States Marshal, but was returned by the United States Attorney to the Clerk of the District Court unserved and unexecuted for the reason that appellant had delivered himself up into custody under the circumstances set forth at pages 52 to 56 of the Transcript. Any reference made to appellant's arrest under this bench warrant is not based on fact.

(2) The Alaska Bone Dry Act was not repealed by the National Prohibition Act. *Abbatte v. U. S.* 270 Fed. 735; *Koppitz v. U. S.* 272 Fed. 99.

CONCLUSION: Counsel for appellee United States Marshal respectfully maintain that the judgment of the District Court dismissing the

Writ and remanding the appellant must be upheld.

First. Because this appellant could have had his proper relief by making a proper appeal to the District Court for the First Division from the proceedings and judgment had in the Justice's court at Sitka.

Second. Appellant should have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal instead of prosecuting habeas corpus.

Third. Appellant is not illegally restrained—he has been released on bail pending appeal from an order remanding him in habeas corpus proceedings, and this appeal should be dismissed in the appellate court for that reason.

Fourth. Appellant was not entitled to prosecute habeas corpus proceedings, according to chapter 57, Compiled Laws of Alaska, because it appeared from the United States Marshal's return, which was uncontroverted, that he held appellant by virtue of the legal judgment of a competent tribunal of criminal jurisdiction, to wit, the judgment of the Justice's court for Sitka precinct, affirmed by the District Court.

Fifth. Appellant is not entitled to relief on the merits of the proceedings and judgment in said Justice's court; the imprisonment was legal and valid.

WHEREFORE, Appellee respectfully prays that said appeal be dismissed and appellant remanded to the custody of appellee to serve his sentence; that the District Court's judgment dismissing said Writ and remanding appellant be declared good and valid;

Respectfully submitted,

ARTHUR G. SHOUP,
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HOWARD D. STABLER,
Special Assistant U. S. At-
torney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

ANGELO GULARAS, Claimant of One McLaughlin Touring Automobile, Serial Number 514,874, Engine Number 487,067, British Columbia License Number 17,893,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

JUN 8 - 1922

F. D. MONCKTON,
CLERK.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.

November Term, 1920.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number, 17,-
893.

*Page-number appearing at foot of page of original certified Transcript of Record.

Libel of Information for Forfeiture.

To the Honorable JEREMIAH NETERER,
United States District Judge, in and for the
Western District of Washington, Sitting in Ad-
miralty in the Northern Division.

The libel of information of Robert C. Saunders,
United States Attorney for the Western District of
Washington, who prosecutes in this behalf for the
United States, and in the name of the United
States, against that certain McLaughlin Touring Au-
tomobile hereinafter fully described, its apparel, ac-
cessories, equipment and appurtenances, in a certain
cause of seizure and forfeiture, civil and maritime,
alleges:

I.

That the McLaughlin touring automobile herein-
above mentioned, is merchandise, to wit: an automo-
bile manufactured at Oshawa, in the Province of On-
tario, Dominion of Canada, and that it is identified
and described by the serial number thereon, to wit:
number 514,874, and by engine number 487,067, and
by a certain license issued by the Province of British
Columbia, being B. C. License Number 17,893; and
that at all the times hereinafter mentioned the said
automobile, together with its equipment, accessories,
apparel and appurtenances, [2] was owned by
persons unknown, residents of the Dominion of Can-
ada.

II.

That heretofore, to wit, on or about the second day
of October, 1920, one Jim Roberts, *alias* John Doe

Rogers, did then and there fraudulently and knowingly import and bring into the United States from a foreign country, to wit, from British Columbia in the Dominion of Canada, and assisted in importing and bringing into the United States, and into the Customs Collection District of Washington, and to and into the Northern Division of the Western District of Washington, and to and into the jurisdiction of this court, certain merchandise, to wit, the aforesaid McLaughlin Automobile hereinbefore more specifically described, together with the equipment, accessories, apparel and furniture thereof; and that at the time of the bringing in and importing of said automobile in the manner and at the time and place aforesaid, the said Jim Roberts, *alias* John Doe Rogers, did not report the arrival of said automobile into the United States, or make any entry of such arrival with the proper customs officers of the said Customs Collection District, or with any customs officer whomsoever, and did not pay or secure to be paid the customs duties due and assessable and payable by law upon the said merchandise, which said customs duties had not been theretofore paid or secured to be paid to the United States.

III.

That heretofore, to wit, on or about the date last mentioned, in the county of Whatcom in the Western District of Washington, Northern Division, and within the jurisdiction of this court, and within the Customs Collection District of Washington, one Jim Roberts, *alias* John Doe Rogers, did fraudulently and knowingly receive, conceal and transport,

[3] and aid and assist in the receipt, concealment and transportation, of certain merchandise, to wit, the said McLaughlin Touring Automobile hereinabove described, together with its equipment, accessories, apparel and furniture, knowing the said merchandise to have been imported into the United States contrary to law, the said merchandise having theretofore been imported and brought into the United States from a foreign country to wit, from British Columbia aforesaid, without declaration of entry thereof at any customs office, and without any payment of the customs duties assessable by law upon said merchandise, and without the securing to be paid of the customs duties aforesaid.

IV.

That at all the times hereinabove mentioned, the said merchandise above described, to wit, the said McLaughlin Touring Automobile, together with its equipment, accessories, apparel and furniture, was subject to the payment of customs duties, under the laws of the United States.

V.

That thereafter, to wit, on or about the 6th day of November, 1920, the said merchandise hereinabove described, to wit, the said McLaughlin Automobile, together with its equipment, accessories, apparel and furniture, was seized by the Deputy Collector of Customs of the United States, at Sumas, in Whatcom County aforesaid, and ever since said time has been and is now in the custody of the Collector of Customs for the Customs Collection District of Washington, and that the said merchandise has been

and is appraised by the customs officers of the said Customs Collection District, at the sum or value of seventeen hundred dollars (\$1700.00).

VI.

That all and singular the premises are true and within [4] the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, the said United States Attorney prays that process in due form of law according to the course and practice of this Honorable Court in causes of information for forfeiture and of admiralty and maritime jurisdiction may issue against the said merchandise, to wit, the said McLaughlin Touring Automobile, its equipment, accessories, apparel and appurtenances, and that all persons having any interest therein may be cited to appear and answer the premises, and that this Honorable Court may be pleased to decree that the said McLaughlin Touring Automobile, together with its equipment, accessories, apparel and appurtenances, may be condemned and forfeited to the United States, according to the form of the statute in such case made and provided.

ROBERT C. SAUNDERS,

United States Attorney.

R. E. CAPERS,

Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division,—ss.

R. E. Capers, being first duly sworn, on his oath deposes and says: That he is Assistant United States Attorney for the Western District of Wash-

ington, and makes this verification for and on behalf of libellant herein; that he makes this libel for and on behalf of the United States of America; that he has read the foregoing libel of information for forfeiture, knows the contents thereof, and the same is true as he verily believes.

R. E. CAPERS.

Subscribed and sworn to before me this 26th day of November, 1920.

S. E. LEITCH,
Deputy Clerk, U. S. District Court, Western Dis-
trict of Washington.

[Endorsed]: Filed in the United States Dis-
trict Court, Western District of Washington, North-
ern Division. Nov. 26, 1920. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [5]

United States District Court, Western District of
Washington, Northern Division.

November Term, 1920.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,067,
British Columbia License Number 17,893.

Appearance of Angelo Gularas.

To the Plaintiff Above Named and to Honorable ROBERT C. SAUNDERS, United States Attorney, and Honorable R. E. CAPERS, Assistant United States Attorney.

You and each of you will please take notice that Angelo Gularas has an equity in the McLaughlin Touring Automobile above mentioned, to the extent of two thousand dollars (\$2000.00), or thereabouts.

You will further please take notice, that we do hereby enter our appearance for said Angelo Gularas and do hereby appear for him in the above-entitled and numbered libel.

All notices, papers, etc., may be served upon us at our office #336 New York Block, Seattle, Washington.

COLE and DOLBY,
Attorneys for Angelo Gularas.

Received copy Jan. 17, 1921.

ROBT. C. SAUNDERS,
By E. D. DUTTON.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Feb. 16, 1921. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [6]

United States District Court, Western District of Washington, Northern Division.

November Term, 1920.

No. 5699.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
077, British Columbia License Number 17,-
893.

Answer to Libel of Information for Forfeiture.

To the Honorable JEREMIAH NETERER, United States District Judge, in and for the Western District of Washington, Sitting in Admiralty in the Northern Division.

Comes now Angelo Gularas, the owner of the McLaughlin Touring Automobile above mentioned and answers the libel of information for forfeiture herein as follows:

I.

Said Angelo Gularas avers, alleges and shows to this Honorable Court that he was at the time of the seizure of said automobile the owner of an equity in said automobile and that since the seizure of the same, as in said libel set forth, he has become the absolute owner thereof, and that he deraigns his title thereto as follows:

That on July 17, 1920, at Vancouver, B. C., he entered into a contract in writing with one Alfred Swanson for the purchase of said automobile agreeing to pay therefor the sum of \$2800.00, in installments upon certain dates all of which was more fully set out in said contract, a copy of which is hereto attached, marked Exhibit "A," and made a part and portion of this answer by reference, the same as though set out *in haec verba*, and immediately follows. [7]

II.

Answering paragraph I, thereof, this answering defendant denies that said McLaughlin Touring Automobile in said libel mentioned is merchandise, and admits the remaining portion of said paragraph.

III.

Answering paragraph II thereof, this answering defendant states that he admits all of said paragraph, save and except he denies that said automobile is merchandise and he believes said Jim Roberts *alias* John Doe Rogers, did fraudulently bring said car into the United States as alleged in said paragraph.

IV.

Answering paragraph III thereof, this answering defendant states that he admits all the allegations of said paragraph save and except he denies that said automobile is merchandise and he believes that said Jim Roberts, *alias* John Doe Rogers, did fraudu-

lently and knowingly commit the acts in said paragraph referred to.

V.

Answering paragraph IV thereof, this answering defendant states he denies that said automobile is merchandise and believes that the remaining portions of said paragraph are true.

VI.

Answering paragraph V thereof, this answering defendant denies that the said automobile was or is merchandise and as to the remaining portions of said paragraph, he believes the same to be true.

VII.

Answering paragraph VI thereof, this answering defendant believes the same to be true, except as hereinafter stated. [8]

Further answering said libel this answering defendant states:

I.

That on July 17, 1920, he entered into a contract with one Harry Sherman to purchase from this answering defendant said automobile, which said contract was in writing and the terms of payment and conditions of said contract being fully set forth therein, a copy of which said contract of sale is hereto attached, made Exhibit "B," and made a part and portion of this answer by reference the same as though set out *in haec verba* and immediately following, and that said Sherman immediately took possession of said automobile under and pursuant to the terms and conditions set forth in said

Exhibit "B," that he would keep and continuously use said automobile as a taxicab and for that purpose only and that it was understood and agreed that said automobile should be used as a taxicab in Vancouver, B. C.

II.

That defendant alleges and states upon information and belief that instead of Sherman using or causing to be used said automobile for taxicab purposes only in and about the city of Vancouver, B. C.; that the same was used at the time of seizure as set forth in the libel herein, for transporting whiskey and liquor from British Columbia into the United States and that at the time said automobile was so seized that it was seized by the sheriff or authorities of Whatcom County, Washington, after said automobile had crossed the International boundary line from British Columbia, into the United States and that when said car was so seized as aforesaid it had therein and there was being transported from British Columbia into the United States, thirteen gunny sacks filled with bottles of Canadian whiskey and that after the seizure of said [9] car and said whiskey by the authorities of Whatcom County, Washington, said car and said whiskey were turned over to the customs officials of the United States and said car is now in the possession of said customs officials at the O. K. Garage in Sumas, Washington, and that as to the disposition of said whiskey this answering defendant knows not.

III.

That said car was so taken and used as herein set

forth without the knowledge, acquiescence, or consent of this answering defendant and that he was and is an innocent party thereto; that he knew nothing about the same in any way and honestly believed that said car was being used in and about Vancouver, B. C., for taxicab purposes only until he learned that it had been seized as herein set forth.

IV.

Deponent further states upon information and belief that neither said car nor said whiskey were at the time set forth in said libel, ever have been or now are merchandise.

WHEREFORE, this answering defendant prays that this answer be considered as herein intended, as the answer of this answering defendant, and for said automobile and that having made, as this answering defendant believes true and correct answer thereto, he prays that said libel be dismissed; that said McLaughlin Touring Automobile, its equipment, accessories, apparel and appurtenances be discharged and turned over and delivered to this answering defendant and that said car be not forfeited and that this answering defendant have such other and further relief and orders as to the Court are just and equitable, meet and proper in the premises.

ANGELO GULARAS,
Defendant.
By COLE & DOLBY,
His Attorneys.

336 New York Block,
Seattle, Washington. [10]

United States of America,
Western District of Washington,
Northern Division,—ss.

Geo. B. Cole, being first duly sworn, on oath deposes and says: That he is one of the attorneys for defendant above named; and makes this verification for and on behalf of the defendant herein for the reason that said defendant is not now within the Western District of Washington, nor the United States of America, but is, as deponent is informed and believes, in Vancouver, B. C., that he has read the foregoing answer to said libel, knows the contents thereof and believes the same to be true.

GEO. B. COLE.

Subscribed and sworn to before me this 30th day of April, 1921.

[Seal] W. W. DEARBORN,
Notary Public in and for the State of Washington,
Residing at Seattle. [11]

Exhibit "A."

CONDITIONAL BILL OF SALE.
THESE PRESENTS WITNESS:

That Alfred Swanson of 458 Hastings St., Vancouver, British Columbia, hereinafter called the Vendor has delivered to Angelo Gularas residing at 1315 Granville St., in Vancouver, British Columbia, hereinafter called the Vendee, the personal property hereinafter described under a contract of

conditional sale. The terms and conditions of which contract of conditional sale are as follows, to wit:

1. Said property is now and shall remain the absolute property of the vendor until after the full and complete payment of the purchase price therefor, which purchase price is the sum of \$2800.00.

2. That the Vendee has this day paid to the Vendor on account of said purchase price, the sum of \$1200.00 the receipt of which is hereby acknowledged.

3. That the balance of said purchase price, to wit: \$1600.00 is evidenced by the following described promissory notes, to wit:

Number	Maker	Date	Due	Amount
1	Angelo Gularas	June 15, 1920	July 18, 1920	\$160.00
2	" "	" "	Aug. 18, 1920	\$160.00
3	" "	" "	Sept. 18, 1920	\$160.00
4	" "	" "	Oct. 18, 1920	\$160.00
A. G. 5	Angelo Gularas	" "	Nov. 18, 1920	\$160.00
6	" "	" "	Dec. 18, 1920	\$160.00
7	" "	" "	Jan. 18, 1921	\$160.00
8	" "	" "	Feb. 18, 1921	\$160.00
9	" "	" "	Mar. 18, 1921	\$160.00
10	" "	" "	Apr. 18, 1921	\$160.00

4. That on full payment of said promissory notes, principal and interest, according to their terms, the title of said property shall vest in said Vendee....

5. The said property and every part thereof at all times while out of the possession of said Vendor.... shall be at the risk of said Vendee and all loss or damage of said property or any part thereof shall be borne by said Vendee.... and no such loss or damage shall operate to extinguish or diminish

any liability upon said notes or any of them; and said Vendee.... further agree.... to keep the said property insured in a sufficient amount in favor of the said Vendor.... to cover.... interest at all times before the vesting of said title in said Vendee.... by the making of said payments as aforesaid.

6. Said Vendee.... shall at all times while the said property is in the possession of said Vendee have the right to use the same for all uses and purposes for which said property is designed.

7. Possession of said property was taken by said Vendee on the 15th day of June, 1920.

8. Said property is described as follows, to wit: One (1) Seven (7) passenger McLaughlin Automobile Model "H" 49, 1919 [12] Engine number 487067, Serial Number 88020, License Number 17893, together with all equipment.

9. In the event of the Party of the Second part making default in any of the payments herein reserved or failing to perform any of the terms, covenants and conditions of this agreement, then in any such event the party of the First Part shall have the right without process of law, to retake possession of the said automobile, and that such default on the part of the Party of the Second Part shall not operate to extinguish or diminish his liability hereunder, and all payments made shall be forfeited to the Party of the First Part as rent, or as liquidated damages.

10. Each payment hereinabove mentioned is a

condition precedent to the sale and transfer of the one-half interest in the said automobile.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands and seals this 17th day of July, 1920.

Signed, sealed and delivered in the presence of
“ANGELO GULARAS.” Seal
HARRY SHERMAN. Seal. [13]

Exhibit “B.”

THIS AGREEMENT made and entered into this 17th day of July, A. D. 1920,

BETWEEN :

ANGELO GULARAS, residing at 1215 Granville Street, in the City of Vancouver, in the Province of British Columbia.

Hereinafter called the Party of the First Part,
AND:

HARRY SHERMAN, residing at the Balmoral Hotel, in the city and Province aforesaid,

Hereinafter called the Party of the Second Part,

WHEREAS, the Party of the First Part is in possession under a certain Purchase Agreement, of an automobile known and described as one (1) Seven (7) Passenger Automobile, Model “H” 1919, Engine Number 487067, Serial Number 88020, License Number 17893.

AND WHEREAS, the Party of the First Part has agreed with the party of the Second Part to place with the Party of the second part the said automobile for the purpose of operating the same as a taxicab, and the Parties being agreeable subject to the terms, covenants and conditions hereinafter set forth.

THIS AGREEMENT THEREFORE WITNESSETH and the Parties mutually agree as follows:

1. The party of the Second Part shall operate the said automobile as a Taxicab, and shall supply a driver for the same.
2. All expenses of and incidental to the operation, upkeep and repair of the said automobile shall be paid by the party of the Second part.
3. The said automobile shall be kept in continuous use as a Taxicab and for that purpose only.
4. The party of the Second Part shall pay to the party of the First Part the sum of Two Hundred and Seventy-five (\$275.00) dollars on the 17th day of August, 1920, and the sum of Two Hundred Seventy-five (\$275.00) dollars on the 17th days of each and every month thereafter, with a final payment of Two Hundred and sixty-five (\$265.00) until the full amount of Three Thousand and Fifteen (\$3015.00) dollars is paid.
5. Upon payment in full of the said sum of Three Thousand and fifteen (\$3015.00) dollars as aforesaid, the Party of the Second Part shall become the owner of one-half interest in the said automobile.

6. Out of each monthly payment as aforesaid the party of the First Part shall pay to the Party of the Second part ten per cent of such monthly payments.

7. The said automobile shall be operated so as to comply with all the requirements of the law and all taxes, fines [14] or other charges shall be paid by the Party of the Second Part and none of these charges shall be paid by the Party of the Second Part, and none of these charges shall or others shall be chargeable against the party of the First Part.

8. The said automobile shall be at the risk of the Party of the Second Part, but each party shall be equally liable for any damages in law arising through collision or accident, providing the same was not caused through the negligence of the party of the first part or his driver.

9. In case default shall be made in the payment of the said promissory notes, or either of them principal or interest, as and when the same shall become due and payable according to their terms, and conditions the vendor.... shall be empowered to take possession of said personal property, with or without process of law, as the said vendor.... *they* elect and this contract shall be forfeited and determined at the election of the vendor.... and all sums therefore paid by the vendee.... shall be retained by the vendor as rent for the use of said personal property and that such default on the part of the vendee.... shall not operate to extinguish or diminish any liability upon the said notes or any of them.

10. Each payment hereinabove mentioned is a conditional precedent to the sale and transfer of the above described property.

IN WITNESS WHEREOF the parties hereto have hereunto set their HANDS and Seals this 15th day of June, A. D. 1920.

A. D. E. SWANSON.

ANGELO GULARAS.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 2, 1921. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [15]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487-
067, British Columbia License Number 17,893,
Respondent.

ANGELO GULARAS,

Claimant.

Reply.

Comes now the above-named libelant, and replying to the answer of the claimant herein, alleges as follows:

I.

Replying to claimant's further answer, libelant alleges that it is not sufficient information upon which to form a belief as to the truth of the allegations contained in paragraphs I, II, III, and IV of said further answer, and, therefore, denies the same and each and every allegation therein contained.

ROBERT C. SAUNDERS,

United States Attorney,

FRANCIS C. REAGAN,

Assistant United States Attorney,

Attorneys for Libelant.

United States of America,

Western District of Washington,

Northern Division,—ss.

F. C. Reagan, being first duly sworn, on his oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington, and one of the attorneys for the libelant herein; that he makes this verification for and on behalf of said libelant; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

F. C. REAGAN.

Subscribed and sworn to before me this 6th day of May, 1921,

[Seal] F. L. CROSBY, Jr.,
Clerk U. S. District Court. [16]

Receipt of copy of the foregoing reply acknowledged this — day of May, 1921.

COLE & DOLBY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 7, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.

November Term, 1921.

No. 5699.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number, 487-
067, British Columbia License Number 17,-
893.

Amended Answer to Libel of Information for Forfeiture.

To the Honorable JEREMIAH NETERER, United States District Judge, in and for the Western District of Washington, Sitting in Admiralty in the Northern Division.

Comes now Angelo Gularas, the owner of the McLaughlin Touring Automobile above mentioned and by consent of the Honorable United States Attorney first had, files the following amended answer, and answers the libel of information for forfeiture herein as follows:

I.

Said Angelo Gularas avers, alleges, and shows to this Honorable Court that he was at the time of the seizure of said automobile the owner of an equity in said automobile, and that since the seizure of the same, as in said libel set forth, he has become the absolute owner thereof, and that he deraigns his title thereto as follows:

That on July 17, 1920, at Vancouver, B. C., he entered into a contract in writing with one Alfred Swanson for the purchase of said automobile, agreeing to pay therefor the sum of twenty-eight hundred (\$2800.00) dollars, in installments upon certain dates, all of which was more fully set out in said contract, a copy of which is hereto attached, marked Exhibit "A" and made a part and portion of this answer by reference, the same as though set out *in haec verba* and immediately following. [18]

II.

Answering paragraph I thereof, this answering defendant denies that said McLaughlin Touring Automobile in said libel mentioned is merchandise, and admits the remaining portion of said paragraph.

III.

Answering paragraph II thereof, this answering defendant denies that the automobile therein mentioned was or is merchandise, and as to the remaining allegations therein set forth, has not knowledge or information thereof sufficient to form a belief, and therefore denies each and every other allegation therein contained, save and except such as are hereinafter admitted, or affirmatively alleged.

IV.

Answering paragraph III thereof, this answering defendant denies that the automobile therein referred to, together with its equipment, accessories, apparel, and furniture, was or is merchandise, and as to the remaining allegations therein set forth, has not knowledge or information thereof sufficient to form a belief, and therefore denies each and every other allegation therein contained, save and except such as are hereinafter admitted, or affirmatively alleged.

V.

Answering paragraph IV thereof, this answering defendant denies that the automobile therein referred to, together with its equipment, accessories, apparel, and furniture was or is merchandise, and as to the remaining allegations therein set forth,

has not knowledge sufficient or information thereof sufficient to form a belief, and therefore denies each and every other allegation therein contained, save and except such as are hereinafter admitted or affirmatively alleged.

VI.

Answering paragraph V thereof, this answering defendant denies that the automobile therein referred to, together [19] with its equipment, accessories, apparel, and furniture was or is merchandise, and as to the remaining allegations therein set forth, has not knowledge or information thereof sufficient to form a belief, and therefore denies each and every other allegation therein contained, save and except such as are hereinafter admitted or affirmatively alleged.

VII.

Answering paragraph VI thereof, this answering defendant has not knowledge or information thereof sufficient to form a belief, and therefore denies each and every other allegation therein contained.

FURTHER ANSWERING SAID LIBEL, this answering defendant states:

I.

That on July 17, 1920, he entered into a contract with one Harry Sherman, to purchase from this answering defendant said automobile, which said contract was in writing and the terms of payment and conditions of said contract being fully set forth therein, a copy of which said contract of sale is hereto attached, marked Exhibit "B," and made a part and portion of this amended answer by ref-

erence, the same as though set out *in haec verba*, and immediately following, and that said Sherman immediately took possession of said automobile under and pursuant to the terms and conditions set forth in said Exhibit "B," that he would keep and continuously use the said automobile as a taxicab and for that purpose only, and that it was understood and agreed that said automobile should be used as a taxicab in Vancouver, B. C., only.

II.

Defendant alleges and states upon information and belief that instead of said Sherman using or causing to be used said automobile for taxicab purposes only in and about the city of Vancouver, B. C., that the same was used at the time of the [20] seizure, as set forth in the libel herein, for transporting whiskey or liquor from British Columbia into the United States, and that at the time said automobile was so seized, that it was seized by the sheriff or authorities of Whatcom County, Washington, after said automobile had crossed the international boundary line from British Columbia, into the United States, and that when said car was so seized, as aforesaid, it had therein, and there was being transported from British Columbia into the United States thirteen gunny sacks filled with bottles of Canadian whiskey, and that after the seizure of said car, and said whiskey, by the authorities of Whatcom County, Washington, said car and said whiskey was turned over to the customs officials of the United States, and said car is now in the possession of said customs officials at the O. K. Garage in Sumas,

Washington, and that as to the disposition of the said whiskey, this answering defendant knows not.

III.

That said car was so taken and used as herein set forth without the knowledge, acquiescence, or consent of this answering defendant, and that he was, and is, an innocent party thereto; that he knew absolutely nothing about the same in any way and honestly believed that said car was being used in and about Vancouver, B. C., for taxicab purposes only, until he learned that it had been seized as herein set forth.

IV.

Defendant further states and alleges upon information and belief, that neither said car, its equipment, accessories, apparel or appurtenances or said whiskey were at the time set forth in said libel, or ever, or at all, have been, or now are merchandise.

V.

Claimant further states upon information and belief, that if said automobile was driven from Vancouver, B. C., into the State of Washington, as alleged in the libel herein, or at [21] all, that it was driven into said state for temporary purposes only, and with the purpose and intent of returning said automobile to Vancouver, B. C.

VI.

That if said car was so driven from Vancouver, B. C., into the State of Washington, without entering the same or informing the customs officials thereof, it was done without the knowledge, acquiescence, or consent of claimant, and that said auto-

mobile was so driven into the State of Washington from British Columbia, if at all, only as an instrument of conveyance, and in the prosecution of a temporary journey or visit.

VII.

Claimant further states that said automobile, at the time of its seizure by the said United States, did belong to claimant, who is the owner thereof, and who is entitled to the immediate restitution thereof, and therefore prays for the restitution thereof, as hereinafter set forth.

AND FURTHER ANSWERING SAID LIBEL,
this answering defendant or claimant states:

I.

He is informed and believes, therefore alleges the fact to be, that at the time the said automobile was seized by the United States Government, it was being used to carry intoxicating liquor from British Columbia into the State of Washington and for no other purpose, and it was being so used, as herein set forth, without the knowledge, acquiescence, or consent in any manner of this claimant.

WHEREFORE, this answering defendant prays that this answer be considered as herein intended, as the answer of this answering defendant, and for said automobile, its equipment, accessories, apparel, and appurtenances, and that having made, as this answering defendant believes true and correct answers thereto, he prays that said libel be dismissed; that said [22] McLaughlin Touring Automobile, its equipment, accessories, apparel and appurtenances be discharged and turned over and delivered to

this answering defendant, and that said car be not forfeited, and that this answering defendant have such other and further relief and orders as to the Court are just and equitable, meet and proper in the premises.

ANGELO GULARAS,
Claimant.

By COLE and DOLBY,
His Attorneys.

336 New York Block,
Seattle, King County,
Washington.

United States of America,
Western District of Washington,
Northern Division.

Geo. B. Cole, being first duly sworn, on oath deposes and says: That he is one of the attorneys for defendant above named; and makes this verification for and on behalf of the defendant herein, for the reason that said defendant is not now within the Western District of Washington, nor the United States of America, but is as deponent is informed and believes, in Vancouver, B. C., and that he has read the foregoing answer to said Libel, knows the contents thereof and believes the same to be true.

GEO. B. COLE.

Subscribed and sworn to before me this 31st day of October, 1921.

[Seal] JAMES A. DOUGAN,
Notary Public in and for the State of Washington,
Residing at Seattle. [23]

Exhibit "A."**CONDITIONAL BILL OF SALE.****THESE PRESENTS WITNESS:**

That Alfred Swanson of 458 Hastings St., Vancouver, British Columbia, hereinafter called the Vendor, has delivered to Angelo Gularas residing at 1215 Granville Street, in Vancouver, British Columbia, hereinafter called the Vendee, the personal property hereinafter described, under a contract of conditional sale. The terms and conditions of which contract of conditional sale are as follows, to wit:

1. Said property is now and shall remain the absolute property of the vendor until after the full and complete payment of the purchase price therefore, which purchase price is the sum of \$2800.00.

2. That the vendee has this day paid to the vendor, on account of said purchase price, the sum of \$1200.00, the receipt of which is hereby acknowledged.

3. That the balance of said purchase price, to wit, \$160.00 is evidenced by the following described promissory notes, to wit:

Number	Maker	Date	Due	Amount	
1	Angelo Gularas	June 15, 1920	July 18, 1920	\$160	\$15 ins.
2	"	"	Aug. 18, 1920	\$160	" "
3	"	"	Sept. 18, 1920	\$160	" "
A. G. 4	"	"	Oct. 18, 1920	\$160	" "
5	"	"	Nov. 18, 1920	\$160	" "
6	"	"	Dec. 18, 1920	\$160	" "
7	"	"	Jan. 18, 1921	\$160	" "
8	"	"	Feb. 18, 1921	\$160	" "
9	"	"	Mar. 18, 1921	\$160	" "
10	"	"	Apr. 18, 1921	\$160	" "

4. That on full payment of said promissory notes, principal and interest, according to their terms, the title of said property shall vest in said vendee.

5. The said property and every part thereof at all times while out of the possession of said vendor, shall be at the risk of said vendee, and all loss or damage of said [24] property or any part thereof shall be borne by said vendee and no such loss or damage shall operate to extinguish or diminish any liability upon said notes or any of them; and said vendee further agrees to keep the said property insured in a sufficient amount in favor of said vendor to cover interest at all times before the vesting of said title in said vendee, by the making of said payments as aforesaid.

6. Said vendee shall at all times while the said property is in the possession of said vendee have the right to use the same for all uses and purposes for which said property is designed.

7. Possession of said property was taken by said vendee on the 15th day of June, 1920.

8. Said property is described as follows, to wit:

One (1) seven (7) passenger McLaughlin Automobile, Model "H" 49, 1919, Engine number 487,067, Serial number 88,020, License number 17,893, together with all equipment.

9. In case default shall be made in the payment of said promissory notes, or either of them, principal or interest, as and when the same shall become due and payable according to their terms and conditions, the vendor shall be empowered to take possession of the said personal property, with or without pro-

cess of law, as the said vendor may elect, and this contract shall be forfeited and determined at the election of the vendor, and all sums therefor paid by the vendee shall be retained by the vendor, as rent for the use of said personal property, and that such default on the part of the vendee shall not operate to extinguish or diminish any liability upon the said notes or any of them.

10. Each payment hereinabove mentioned is a condition precedent to the sale and transfer of the above described property.

IN WITNESS WHEREOF, *that* parties hereto have hereunto set their hands and seals this 15th day of June, A. D. 1920.

A. D. E. SWANSON. (Seal)

ANGELO GULARAS. (Seal)

J. D. MCPHEE. [25]

Exhibit "B."

THIS AGREEMENT made and entered into this 17th day of July, A. D. 1920.

BETWEEN:

ANGELO GULARAS, residing at 1215 Granville Street in the City of Vancouver, in the Province of British Columbia,

Hereinafter called the party of the First Part,

AND:

HARRY SHERMAN, residing at the Balmoral Hotel, in the City and Province aforesaid,

Hereinafter called the Party of the Second Part.

WHEREAS, the party of the first part is in pos-

session, under a certain Purchase Agreement, of an automobile, known and described as One (1) Seven (7) Passenger Automobile, Model "H" 49, 1919, Engine Number 487,067, Serial Number 88,020, License Number 17, 893.

AND WHEREAS, the party of the first has agreed with the party of the second part to place with the party of the second part the said automobile for the purpose of operating the same as a taxicab, and the parties being agreeable subject to the terms, covenants and conditions hereinafter set forth.

THIS AGREEMENT THEREFORE WITNESSETH that the parties mutually agree as follows:

1. The party of the second part will operate the said automobile as a taxicab, and shall supply a driver for same.
2. All expenses of and incidental to the operation upkeep and repair of the said automobile shall be paid by the party of the second part.
3. The said automobile shall be kept in continuous use as a taxicab, and for that purpose only.
4. The party of the second part shall pay to the party of the first part, the sum of Two Hundred and Seventy-five [26] (\$275.00) dollars on the 17th day of August, 1920, and the sum of Two Hundred and seventy-five (\$275.00) dollars on the 17th days of each and every month thereafter, with a final payment of two hundred and sixty-five dollars (\$265.00), until the full amount of Three Thousand and fifteen (\$3015.00) Dollars is paid.

5. Upon payment in full of the said sum of Three thousand and fifteen (\$3015.00) Dollars as aforesaid, the party of the second part shall become the owner of a one-half interest in the said automobile.

6. Out of each monthly payment as aforesaid the party of the first part shall pay to the party of the second part ten per cent (10%) of such monthly payments.

7. The said automobile shall be operated so as to comply with all the requirements of the law, and all taxes, fines or other charges shall be paid by the party of the second part, and none of these charges shall or others shall be chargeable against the party of the first part.

8. The said automobile shall be at the risk of the party of the second part, but each party shall be equally liable for any damages in law arising through collision or accident, providing the same was not caused through the negligence of the party of the second part, or his driver.

9. In the event of the party of the second part making default in any of the payments herein reserved or failing to perform any of the terms, covenants, and conditions of this agreement, then in any such event, the party of the first part shall have the right without process of law, to retake possession of said automobile, and that such default on the part of the party of the second part shall not operate to extinguish or diminish his liability hereunder, and all payments made shall be forfeited to the party of the first part as rent, or as liquidated damages. [27]

10. Each payment hereinabove mentioned is a condition precedent to the sale and transfer of the one-half interest in the said automobile.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 17th day of July, 1920,

Signed, sealed and delivered in the presence of

ANGELO GULARAS. (Seal)

HARRY SHERMAN. (Seal)

Received a copy of the within amended libel this 31st day of October, 1921.

THOS. P. REVELLE,

Attorney for Libelant.

By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 31, 1921. F. M. Harshberger. S. E. Leitch. [28]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Demurrer.

Comes now the above-named libelant, by Thomas P. Revelle, United States Attorney for the Western District of Washington, and John A. Frater, Assistant United States Attorney for said district, and demurs to the further answers of Angelo Gularas, for the reason that said further answers do not constitute a defense to this action.

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney.

Received copy of foregoing demurrer this November 29, 1921.

COLE & DOLBY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 30, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Findings of Fact and Conclusions of Law.

This cause heretofore coming on regularly for trial in open court, libelant appearing by John A. Frater, Assistant United States Attorney, and claimant, Angelo Gularas, appearing by J. D. McPhee and Geo. B. Cole, of Cole & Dolby, and said cause having been tried and submitted to the Court for its decision, and the Court being advised in the premises, makes the following

FINDS OF FACT.**I.**

The McLaughlin touring automobile above mentioned and referred to in this cause of action was on and prior to June 15th, 1920, owned by one Alfred Swanson, and that on said June 15th, 1920, said Swanson sold this automobile under conditional sale contract to Angelo Gularas, claimant herein, and that subsequently said Angelo Gularas made all of said deferred payments, and now is the owner of said automobile; thereafter and on July 17th, 1920, said Angelo Gularas entered into a contract in writing with one Harry Sherman, whereby said Sherman agreed to run and operate or cause to be run and operated said automobile as a taxicab, and for that purpose only, in Vancouver, British Columbia, and that said Alfred Swanson, said Angelo Gularas, [30] Claimant herein, and said Harry Sherman, are each and all Canadian subjects and residents of Vancouver, British Columbia.

II.

That said Harry Sherman delivered said automo-

bile to one Jim Roberts, *alias* Rogers, to drive as a taxicab in the city of Vancouver, B. C., and that said Roberts instead of continuing to so drive said automobile as a taxicab and for taxicab purposes only, placed or caused to be placed in said automobile on or about October 1st, 1920, thirteen (13) gunny sacks filled with bottles of Canadian whiskey, and said automobile with said whiskey was driven into the State of Washington from British Columbia on or about said October 1, 1920, and said Roberts did not report the arrival of said automobile into the United States, or make any entry of such arrival with the customs officials of said Customs Collection District, or with any customs officers whatsoever, nor did he pay any customs or duty upon said automobile, and on or about October 1, 1920, was arrested by the Sheriff of Whatcom County, Washington, and said automobile and whiskey seized by said sheriff, and that said automobile was thereafter and on November 6, 1920, by said sheriff, turned over to and seized by the customs officials in the customs collection district of Washington, and held by them on a claim that the same was not entered or declared when it came into the State of Washington, and the United States of America.

III.

That at the time said automobile was seized as aforesaid, it was being used to carry prohibited intoxicating liquor from British Columbia into the State of Washington, and for no other purpose, and said automobile was so driven into the State of

Washington from British Columbia only as an instrument of conveyance [31] for temporary purposes, and only in the prosecution of a temporary journey or visit, and with the purpose and intent of returning said automobile to Vancouver, British Columbia, all of which was done without the knowledge, acquiescence or consent in any manner of claimant, who is an innocent party, and in no way connected with either said automobile coming within the United States or its transportation of liquor, and that said claimant knew absolutely nothing about the same in any way, and honestly believed that said automobile was then and there being used in and about Vancouver, British Columbia, for taxicab purposes only, until he learned that it had been seized by the Deputy Collector of Customs, of the United States.

IV.

That said automobile, together with its equipment, accessories, apparel and furniture is not, and at the time of its entry into the United States of America, as well as at the time of its seizure as aforesaid, was not merchandise, and that said automobile was wrongfully seized by the United States Government officials, and that forfeiture of the same should not be had.

To all of which libellant excepts and an exception is allowed.

Done in open court and dated at Seattle, Washington, this 24th day of January, 1922.

EDWARD E. CUSHMAN,
Judge.

From the foregoing FINDINGS OF FACT the Court concludes as follows:

CONCLUSIONS OF LAW.

I.

That the automobile referred to herein is not subject [32] to forfeiture under Section 3082 Revised Statutes of the United States, or at all; that claimant, Angelo Gularas, is an innocent owner of said automobile, and not connected in any way with the bringing of said automobile into the United States, which said car was brought into the United States without the knowledge, acquiescence or consent of said claimant, Angelo Gularas, and that at the time said automobile crossed the International Boundary line from British Columbia, Canada, into the United States of America, and into the State of Washington, said Angelo Gularas, claimant herein, honestly believed that said automobile was being run and operated as a taxicab and for that purpose only in the city of Vancouver, British Columbia, and that the said Angelo Gularas was innocent of any wrong or wrongdoing in the premises.

II.

That as said automobile was engaged in the importation of prohibited alcoholic liquor at the time of its seizure in the United States, it was not engaged in the importing of any merchandise, and was and is not subject to forfeiture under the customs law of the United States.

III.

That said automobile, together with its equip-

ment, accessories, apparel, and furniture is not, and at the time of its entry into the United States of America, as well as at the time of its seizure as aforesaid, was not, merchandise, and that said automobile was wrongfully seized by the United States Government officials and that forfeiture of the same should not be had, and that said automobile should be delivered to claimant, Angelo Gularas, free of costs and charges.

To all of which libellant excepts and exception is allowed.

Done in open court this January 24, 1922,

EDWARD E. CUSHMAN,

Judge. [33]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [34]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Order and Decree.

THIS cause heretofore coming on regularly for trial, Honorable John A. Frater, Assistant United States Attorney, appearing for and on behalf of libelant, and J. D. McPhee and Geo. B. Cole, of Cole & Dolby appearing for and on behalf of claimant, Angelo Gularas, and the Court having heretofore made its FINDINGS OF FACT and CONCLUSIONS OF LAW, and being fully advised in the premises,—

IT IS ORDERED, ADJUDGED and DECREED that the information of libel for forfeiture herein be, and the same hereby is dismissed with prejudice, and that said automobile be forthwith restored and delivered by the United States Marshal and customs officials to Angelo Gularas, claimant herein, or his representatives or attorneys, free and clear from any claims of any nature for storage or otherwise, or for costs of said marshal or customs officials.

To all of which libelant excepts and an exception is allowed.

Done in open court this January 24, 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [35]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License No. 17,893.

Order Fixing Bond and Release of Automobile.

The above matter coming on regularly to be heard in open court on January 27th, 1922, Honorable John A. Frater, Assistant United States Attorney appearing on behalf of United States, Geo. B. Cole, of Cole & Dolby, appearing on behalf of Claimant, Angelo Gularas, on the application of claimant that the Court fix the bond upon the giving of which said automobile is to be released, and the Court after argument of counsel and being fully advised in the premises,—

ORDERS, that said McLaughlin Touring Automobile, Serial No. 514,874, Engine No. 487, 067, British Columbia License No. 17,893 (for 1921), be released unto said Angelo Gularas upon said Gularas executing a bond to be approved by this Court, in the sum of \$500.00, payable to the United States of America, libellant herein.

Done in open court this 31st day of January, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

JOHN A. FRATER,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 31, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [36]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487-
067, British Columbia License Number 17,-
893.

Notice of Appeal.

To COLE & DOLBY and J. D. MCPHEE, Proctors
for Claimant Angelo Gularas, and to F. M.
HARSHBERGER, Esquire, Clerk of the
United States District Court for the Western
District of Washington:

PLEASE TAKE NOTICE that the libelant above

named, United States of America, hereby appeals from the final decree and order made and entered herein on the 24th day of January, 1922, dismissing with prejudice said libel, and ordering the return of the automobile claimed to claimant Angelo Gularas, to the next United States Circuit Court of Appeals for the Ninth Circuit to be holden in and for said circuit at the city of San Francisco, California.

Dated this 23d day of February, 1922.

THOMAS P. REVELLE,
Assistant United States Attorney.
JOHN A. FRATER,
United States Attorney.

Service accepted this 23d day of February, 1922.

J. D. MCPHEE and
COLE & DOLBY,

Proctors for Claimant Angelo Gularas.

[Endorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. S. E. Leitch. [37]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number, 487,-
067, British Columbia License Number 17,-
893.

Petition for Appeal.

To the Honorable EDWARD E. CUSHMAN, District Judge:

The above-named libelant, United States of America, feeling itself aggrieved by the decree rendered and entered in the above-entitled cause on the 24th day of January, 1922, wherein and whereby the libel of libelant was dismissed and whereby the automobile claimed was ordered returned to the claimant, Angelo Gularas, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, with the object of obtaining a reversal of the same, for the reasons and upon the grounds specified in the assignment of errors which is filed herewith. The libelant prays that this appeal may be allowed, that citation be issued as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit within the time and in the manner agreeable to the subsisting rules promulgated by said court.

Dated this 23d day of February, 1922.

THOMAS P. REVELLE,

United States Attorney.

JOHN A. FRATER,

Assistant United States Attorney.

Received a copy of the above petition for appeal
this 23d day of February, 1922.

J. D. McPHEE and
COLE & DOLBY,

Proctors for Claimant and Appellee, Angelo Gu-
laras. [38]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [39]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487-
067, British Columbia License Number 17,-
893.

Assignment of Errors on Appeal of the United States.

Comes now the United States of America, having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree in the above-entitled United States District Court for the Western District of Washington, made and entered on the 24th day of January, 1922,

wherein and whereby the amended answer and claim of claimant Angelo Gularas to the libel of information in said cause was sustained, and the said libel of information dismissed, makes and files the following assignment of errors, upon which it will rely upon its prosecution of the appeal herein, and does hereby assign that the above-entitled United States District Court erred in the following particulars:

I.

That the United States District Court for the Western District of Washington erred in making and entering said decree made and entered on the 24th day of January, 1922.

II.

That said District Court erred in overruling the allowing the answer and claim of claimant Angelo Gularas to the libel of information in said cause and in dismissing said libel of information. [40]

III.

That said District Court erred in overruling the demurrer of the libellant to the further answers of the claimant, Angelo Gularas.

IV.

That the said District Court erred in holding and deciding in substance and effect that the libellant or any of its officers had no right to the possession of said automobile referred to in said libel of information and claimed by said Angelo Gularas, or any right to detain or forfeit the same.

V.

That said District Court erred in failing and refusing to make and enter a decree forfeiting the

said automobile described in said libel of information.

VI.

That said District Court erred in making and entering its order and decree for the return and delivery of said automobile to said claimant, Angelo Gularas.

WHEREFORE, the appellant, United States of America, prays that said decree be reversed and that said District Court for the Western District of Washington be directed to reverse and set aside said decree and to enter a decree forfeiting said automobile to the United States.

Dated this 23d day of February, 1922.

THOMAS P. REVELLE,

United States Attorney.

JOHN A. FRATER,

Assistant United States Attorney.

Received a copy of the above assignment of errors on this 23d day of February, 1922.

J. D. MCPHEE and

COLE & DOLBY,

Attorneys for Claimant and Appellee, Angelo Gularas. [41]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [42]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Order Allowing Appeal.

On motion of Thomas P. Revelle, United States Attorney for the Western District of Washington, proctor for libelant, United States of America, and on filing the petition of said libelant for an order allowing an appeal, together with notice of appeal, assignment of error and a prayer for the reversal of the decree filed and entered in said cause on the 24th day of January, 1922, it is hereby

ORDERED, that an appeal be, and is hereby, granted and allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree filed and entered herein on the 24th day of January, 1922, sustaining the amended answer of the claimant, Angelo Gularas, to the libel of information herein and dismissing the said libel of information; and it is hereby

FURTHER ORDERED, that a transcript of the record, proceedings, documents and pleadings, find-

ings of fact and conclusions of law and decree, duly authenticated and certified, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit. [43]

Dated this 23d day of February, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

Received a copy of the within order allowing appeal on this 23d day of February, 1922.

J. D. McPHEE and
COLE & DOLBY,

Proctors for Claimant and Appellee, Angelo Gularas.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number, 514,874, Engine No. 487,067,
etc.

Order Extending Time in Which to Prosecute an Appeal.

Upon motion of the United States Attorney,—

It is hereby ORDERED, ADJUDGED AND DECREED that the time in which the United States may prosecute its appeal herein as hereby extended twenty days from February 3d, 1922,

Done in open court this 1st day of February, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—J. D. McPHEE and
COLE & DOLBY,

Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 2, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487-
067, British Columbia License Number 17,-
893.

Order Extending Time to File Bill of Exceptions.

BE IT REMEMBERED, that this matter came on duly and regularly, and it appearing to the Court that good cause has been shown why the time for filing the bill of exceptions on appeal may be extended therefore, it is hereby

ORDERED AND ADJUDGED that the time for filing the bill of exceptions on appeal may be extended to a day thirty days from and after the entry of this order.

Done in open court this 20th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—COLE & DOLBY,
Proctors for Claimant and Libelant, Angelo Gu-
laras.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. March 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

**Order Extending Time to File Record on Appeal in
Circuit Court of Appeals.**

BE IT REMEMBERED, that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended, now, therefore, it is hereby

ORDERED AND ADJUDGED that the date and time for filing the record on appeal with the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, be extended for a period of thirty days from and after the date of entry of this order.

Done in open court this 20th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—COLE & DOLBY,
Proctors for Claimant and Libelant, Angelo Gularas

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. March 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [47]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN AUTOMOBILE, Serial No. 514,874, Engine No. 487,067, B. C. License No. 17,893,

Respondent.

Order Extending Time for Settling Bill of Exceptions and Filing Record.

Upon motion of the United States Attorney, it is hereby

ORDERED that the time for settling the bill of exceptions in the above-entitled cause and for filing the record in the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended for a period of twenty days from this date.

Done in open court this 18th day of April, 1922.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 18, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [48]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License No. 17,893.

Respondent.

ANGELO GULARAS,

Claimant.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for trial on January 18th, 1922, the United States appearing by its District Attorney, and the Claimant, Angelo Gularas, appearing by his attorney, and thereupon the following proceedings were had, to wit:

Without any testimony being adduced it was admitted in open court by the claimant that the automobile in question,—one McLaughlin touring automobile, Serial Number 514,874, Engine Number 487,067, British Columbia License No. 17,893, on or about October 2d, 1920, was imported and brought into the United States by one John Doe Rogers, *alias* Jim Roberts, from British Columbia. And it was further admitted by the claimant that no report of the entry of said automobile into the United States

was made to the proper office or officials of the United States Customs Department, or to any officer or official of the United States Customs Department; and it was further admitted that the said John Doe Rogers, [49] *alias* Jim Roberts, at the time of the entry of the said automobile into the United States and at the time of its arrival into the United States, did not pay or secure to be paid any customs duties due and assessable against and upon said automobile, or any duties whatsoever in connection with the importation thereof, and that at the time of the importation of said automobile no customs duties due or assessable against and upon said automobile had been theretofore paid or secured to be paid to the United States. It was further admitted that the said John Doe Rogers, *alias* Jim Roberts received, concealed and transported, and aided in the concealment and transportation, of the said automobile within the jurisdiction of the said District Court in Whatcom County, Washington, knowing the said automobile to have been imported into the United States without any report of its arrival therein having been made, as required by law, and without any customs duties due or assessable against and upon said automobile having been paid or secured to be paid to the United States. It was also admitted by the claimant that the said automobile, on or about November 6th, 1920, had been seized by a deputy collector of customs in the jurisdiction of said District Court; that the said automobile at the time of trial was in the jurisdiction of the said District Court; and that the same had been ap-

praised in the amount of \$1700.00. It was further admitted by claimant that the said automobile was manufactured at Oshawa, in the Province of Ontario, Dominion of Canada.

It was admitted by the Government that if the claimant were present he would testify that on June 17, 1920, the automobile in question was owned by one Swanson; that on that date he entered into an agreement in writing with the claimant whereby the claimant [50] agreed to purchase the automobile in question under contract making a certain payment down and certain other payments on specified dates, which contract is dated June 15, 1920, and was filed for record in the recorder's office in Vancouver, B. C., on June 17, 1920. It was further admitted by the Government that if the claimant were present he would testify that the claimant since the making of said contract had fully performed the same and made all payments due thereunder to the vendor; that on July 17, 1920, claimant entered into a contract with one Sherman whereby the claimant leased or rented to the said Sherman the said automobile upon certain conditions, which said contract contained a clause providing for the purchase by the said Sherman under certain conditions of the said automobile; that the contract further provided that Sherman was to use the automobile for taxicab purposes only in the city of Vancouver, B. C.; that the contract with Sherman was recorded on July 20, 1920, in Vancouver, B. C.; that the contract with Sherman further provided that Sherman "shall operate the said automobile as a taxicab

and shall supply a driver for same"; that the contract further provided "that the said automobile shall be kept in continuous use as a taxicab and for that purpose only"; that the contract further provided that "the said automobile shall be operated so as to comply with all the requirements of the law and all taxes, fines or other charges shall be paid by the party of the second part (Sherman) and none of these charges or others shall be chargeable against the party of the first part (claimant)." That the said Sherman employed as a driver for said taxicab the said John Doe Rogers, *alias* Jim Roberts, and that the said Rogers, *alias* Roberts, on or about October 2d, 1920, loaded said taxicab with approximately 13 gunny sacks [51] of Canadian whiskey and came across the line from British Columbia into the State of Washington at some point near Sumas, Washington; that the driver of the taxicab was employed by Sherman, and that the driver's name was not known to claimant; that after Rogers, *alias* Roberts, had entered the United States with the automobile loaded with whiskey he was arrested in Whatcom County, Washington.

It was further admitted by the Government that if the claimant were present he would testify that the claimant was at all times an innocent party and knew nothing of the transaction involving the importation of the automobile or the whiskey into the United States, and that the agreement between claimant and Sherman was entered into in good faith; that the said automobile was taken and used as aforesaid without the knowledge, acquiescence or

consent of claimant; that he knew absolutely nothing about the same in any way and honestly believed the said automobile was being used in and about the city of Vancouver, B. C., for taxicab purposes only, until he learned that it had been seized as aforesaid. That the importation or bringing into the United States of the said automobile without entering the same or informing the customs officers thereof was done without the knowledge, consent or acquiescence of claimant. It was further admitted by the Goverment that if the claimant were present he would testify that the claimant was the owner of said automobile, and further, that the said Swanson, Sherman and claimant are all Canadian subjects and residents of Vancouver, B. C.

Thereupon, claimant offered in evidence the said conditional bill of sale from Alfred Swanson to claimant, the agreement or contract between claimant and the said Sherman, and a letter from the sheriff of Whatcom County, Washington, relative to the arrest, [52] conviction and sentence imposed by the State of Washington upon the said Rogers, *alias* Roberts, in connection with the illegal possession of intoxicating liquor. The offer was objected to on the part of the Government, for the reason that the exhibits offered were incompetent, irrelevant and immaterial, and offered no defense to the libel of information or the cause of action pleaded therein; for the further reason that the libel of information was predicated upon the failure to report to the customs officers the arrival and importation of said automobile, the said automobile being duti-

able merchandise, and that the question of whether or not said automobile contained intoxicating liquor was immaterial, under the cause of action pleaded; and for the further reason that the libel of information was predicated upon sections 3082, 3098 and 3099, Revised Statutes of the United States, under which statutes the question of the innocence of the owner of the automobile or of his lack of participation in the importation of the automobile was incompetent, irrelevant and immaterial; and for the further reason that the innocence or lack of any intent to defraud on part of claimant was no defense to the cause of action pleaded in the libel of information.

The objection was overruled by the Court and the exhibits offered were admitted; the conditional bill of sale from Swanson to claimant being marked Defendant's Exhibit "A"; the agreement between claimant and said Sherman being marked Defendant's Exhibit "B"; and the letter from the sheriff of Whatcom County, Washington, being marked Defendant's Exhibit "C"; to which ruling of the Court an exception was taken by the Government, and the exception was allowed. [53]

Thereupon, the following proceedings were had:

"Mr. FRATER.—In view of your Honor's position, may I again raise my objection to this letter from Whatcom County, which has to do with the arrest of the man who brought this liquor, and his prosecution in the State Court. Surely that has no part in this action. That is independent of any claim of lawful ownership on the part of the claimant Mr. Gularas."

The COURT.—It might be considered this way. You are asking the Court to consider the opportunities for collusion, and it certainly shows that if there was collusion between the driver and the owner and the man operating the taxicab man it shows that one of them at least was not gaining any advantage by this collusive agreement. I will allow it to go in.

It seems to me the ground of my ruling in the other case would seem to apply here, that so far as the innocent owner of property on the other side is concerned that the law of nations probably applies and modifies the customs law. I am not particularly excited about our Canadian brethren over there and their property, but I do not want to lay down a rule of action here that will invite the authorities on the other side, when somebody steals an automobile from a citizen of the State of Washington and goes over there on some illegal errand that they are going to say that those that live by the sword can die by the sword and forfeit our property and that of our citizens [54] on a technical violation of any law. I think it is the duty of the Court to adopt a liberal policy regarding the innocent owners of property on the other side that have been put in a position where they have lost their properties and been jeopardized by the illegal act of some one for whom they are not responsible. I still feel the same way.

“Mr. FRATER.—Well, your Honor, I want to note an exception to your Honor’s ruling in admitting these exhibits, and then call your Honor’s attention to the fact that your reference to the fact that if some one stole an automobile—now, that is

a very different situation than obtains in this case, and there are decisions, in fact the rules of the Customs Department provide against the seizure, they will return a car upon proof that it has been stolen. I just call your Honor's attention to that. That is a very different situation than what obtains here.

“The COURT.—I know that in the Internal Revenue they have gone a great ways, and under the rules that you invoked a while ago, where two innocent parties may suffer, the one that enabled the misconduct to be brought about would be the one to suffer. Now, that may be all right in the Internal Revenue, our citizens can’t get away from a harsh rule of that kind, but to hang that rule out over the border and have it forfeit the property of innocent parties subject of another nation, I am not going to extend the time. Make your record here and let it be reviewed. The sooner it is reviewed the better, because with the pressure there is in [55] getting the liquor into this country now there will be a temptation to take advantage of a liberal rule like this and the law. The sooner it is finally settled the better, because it will be coming up hereafter undoubtedly, so you can finish this record as soon as you can.”

* * * * *

“The COURT.—Well, I suppose your exhibits show the length of time it had been used as a taxicab. A second-hand vehicle may be merchandise if it is brought into the country for the purpose of being sold. At the same time, a vehicle that is being

used as a vehicle for the transportation of other articles, be they merchandise or be they contrabrand, if it is used as a vehicle to bring them into the country with the idea of turning around again and going out of the country, why, there is no question whether that vehicle is merchandise, just along the same lines that the court reasons that a ship that is carrying cargo is not itself merchandise.

I have decided this case on the idea that this was not a new automobile simply being driven over here to be sold again as a new automobile on this side, but was being used just as the arguments and exhibits indicate, a taxicab embezzled by a driver and used on some night hawking trip to bring whiskey over into this country with the idea of going back and bringing some more over.

Mr. COLE.—Yes, and taken over on its own power.

Mr. FRATER.—I do not believe that the fact that an automobile, or any other instrument, for that matter, or conveyance, because it is propelled on its own wheels or under its own [56] power, that that relieves it of the characteristic of merchandise.

The COURT.—If it is being brought over here under its own power with the idea of being sold on this side or retained here permanently by the owner on this side, why, it is merchandise. I do not think there is any question about it. But if it is just temporarily coming across the line with the idea of returning particularly where it is in the hands of someone who has embezzled it, I doubt whether it

is merchandise in the meaning of that statute."

BE IT FURTHER REMEMBERED that on the 24th day of January, 1922, the Court made its findings of fact and conclusions of law, and on the same date entered an order and decree wherein it was ordered that the said libel of information was dismissed with prejudice, and that the automobile in question was forthwith restored and delivered by the United States marshal to the claimant free and clear from any liens of any nature for storage or otherwise or for costs of said marshal or the customs officers in connection with the seizure of the same, to which findings of fact, conclusions of law, and said order and decree, the Government excepted, and its exceptions were allowed.

On March 20, 1922, an order was made and duly entered in this case to the effect that the time within which to file and serve and have certified the bill of exceptions be, and by the said order was, extended to and including April 19, 1922, and on the 18th day of April, 1922, a further order was duly made and entered extending the time within which to file and [57] serve and have certified the bill of exceptions in said case to and including the 8th day of May, 1922.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Edward E. Cushman, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, before whom the above-entitled cause was tried, do hereby certify that

the matters and proceedings set forth in the foregoing bill of exceptions are matters and proceedings which occurred on the trial of said cause, and the same hereby are made part of the record herein; counsel for the respective parties hereto being present and concurring herein.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of May, 1922, at Seattle, in said District.

EDWARD E. CUSHMAN,
Judge.

O. K.—COLE & DOLBY,
By GEO. B. COLE,
Atty. for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 1, 1922. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy. [58]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Praecipe for Transcript of Record.

To F. M. Harshberger, Clerk of the Above-entitled Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit:

1. Libel of information for forfeiture.
2. Appearance of Angelo Gularas.
3. Answer to libel.
4. Reply.
5. Amended answer to libel.
6. Demurrer.
7. Findings of fact and conclusion of law.
8. Order and decree.
9. Order fixing bond and release of automobile.
10. Notice of appeal.
11. Petition for appeal.
12. Assignment of errors.
13. Order allowing appeal. [59]
14. Citation on appeal.
15. Order extending time in which to appeal, dated Feb. 1st, 1922.
16. Order extending time to file bill of exceptions, Mar. ——, 1922.
17. Order extending time to file record on appeal in Circuit Court, Mar. ——, 1922.
18. Order extending time for settling bill of exceptions and filing record.

19. Bill of exceptions.
20. Copy of this praecipe.

Dated at Seattle, Washington, May 4, 1922.

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney.

Service of the within praecipe is hereby admitted
this 4th day of May, 1922.

COLE & DOLBY,
Attorneys for Claimant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this court.

THOMAS P. REVELLE,
United States Attorney.
JOHN A. FRATER,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 4, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [60]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,

Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 60, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:
[61]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 150 folios at 15c	\$22.50
Certificate of Clerk to transcript of record, 4 folios at 15c .....	.60
Seal to said certificate .....	.20

I hereby certify that the above costs for preparing and certifying recording, amounting to \$23.30, will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending June 30, 1922.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 5th day of May, 1922.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [62]

United States District Court, Western District of Washington, Northern Division.

No. 5699.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
Serial Number 514,874, Engine Number 487,-
067, British Columbia License Number 17,-
893.

Citation on Appeal.

The United States of America,—ss.

To Angelo Gularas, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty days from date hereof, pursuant to an appeal filed in the office of the clerk of the United States District Court in and for the Northern Division of the Western District of Washington, wherein the United States of America is appellant, and Angelo Gularas is appellee, to show cause, if any there be, why the decree of said Court, signed, filed and entered on the 24th day of January, A. D. 1922, sustaining the exceptions of said Angelo Gularas to the libel of information and dismissing the said libel of information as mentioned in said order allowing an appeal, should not be reversed, modified or corrected and why speedy jus-

tice should not be done to the parties in that behalf.

[63]

WITNESS the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 23d day of February, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Due service of the within citation on appeal is hereby admitted and acknowledged on behalf of the appellee, Angelo Gularas, this 23d day of February, 1922.

J. D. McPHEE and
COLE & DOLBY,
Proctors for Claimant and Appellee, Angelo Gularas.

[Endorsed]: No. 5699. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Libelant, vs. One McLaughlin Touring Automobile, Serial Number 514,874, Engine Number 487,067, British Columbia License Number 17,893. Citation on Appeal. Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 23, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [64]

[Endorsed]: No. 3871. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Angelo

Gularas, Claimant of One McLaughlin Touring Automobile, Serial Number 514,874, Engine Number 487,067, British Columbia License Number 17,893, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 8, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3871

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

— vs —

ONE McLAUGHLIN TOURING AUTOMOBILE,
SERIAL NUMBER 514874, ENGINE NUMBER
487067, BRITISH COLUMBIA LICENSE NUM-
BER 17893, RESPONDENT

ANGELO GULARAS, APPELLEE

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION

HON. EDW. E. CUSHMAN, Judge

Brief of Appellee

GEO. B. COLE AND JOHN WESLEY DOLBY,
Seattle, Washington

J. D. MCPHEE, Vancouver, B. C.
Attorneys for Appellee

No. 3871

In the

United States Circuit Court
of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

— vs —

ONE McLAUGHLIN TOURING AUTOMOBILE,
SERIAL NUMBER 514874, ENGINE NUMBER
487067, BRITISH COLUMBIA LICENSE NUM-
BER 17893, RESPONDENT

ANGELO GULARAS,

APPELLEE

APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION

HON. EDW. E. CUSHMAN, Judge

Brief of Appellee

STATEMENT OF CASE

The FINDINGS OF FACT, CONCLUSIONS OF LAW
and DECREE of the Honorable Nisi Prius Court set
forth the facts with such exactness that we adopt
them. they being *inter alia*, as follows:

“FINDINGS OF FACT**I**

“The McLaughlin touring automobile above mentioned and referred to in this cause of action was on and prior to June 15, 1920, owned by one Alfred Swanson, and that on said June 15, 1920, said Swanson sold this automobile under conditional sale contract to Angelo Gularas, claimant herein, and that subsequently said Angelo Gularas made all of said deferred payments, and now is the owner of said automobile; thereafter and on July 17, 1920, said Angelo Gularas entered into a contract in writing with one Harry Sherman, whereby said Sherman agreed to run and operate or cause to be run and operated said automobile as a taxicab, and for that purpose only, in Vancouver, British Columbia, and that said Alfred Swanson, said Angelo Gularas, claimant herein, and said Harry Sherman, are each and all Canadian subjects and residents of Vancouver, British Columbia.

II

“That said Harry Sherman delivered said automobile to one Jim Roberts, alias Rogers, to drive as a taxicab in the city of Vancouver, B. C., and that said Roberts instead of continuing to so drive said automobile as a taxicab and for taxicab purposes only, placed or caused to be placed in said automobile on or about October 1, 1920, thirteen (13)

gunny sacks filled with bottles of Canadian whiskey, and said automobile with said whiskey was driven into the State of Washington from British Columbia on or about said October 1, 1920, and said Roberts did not report the arrival of said automobile into the United States, or make any entry of such arrival with the customs officials of said customs collection district, or with any customs officers whatsoever, nor did he pay any customs or duty upon said automobile, and on or about October 1st, 1920, was arrested by the sheriff of Whatcom County, Washington, and said automobile and whiskey seized by said sheriff, and that said automobile was thereafter and on November 6, 1920, by said sheriff, turned over to and seized by the customs officials in the customs collection district of Washington, and held by them on a claim that the same was not entered or declared when it came into the State of Washington, and the United States of America.

III

"That at the time said automobile was seized as aforesaid, it was being used to carry prohibited intoxicating liquor from British Columbia into the State of Washington, and for no other purpose, and said automobile was so driven into the State of Washington from British Columbia only as an instrument of conveyance for temporary purposes, and only in the prosecution of a temporary journey or visit, and with the purpose and intent of returning said automobile to Vancouver, British Co-

lumbia, all of which was done without the knowledge, acquiescence or consent in any manner of claimant, who is an innocent party, and in no way connected with either said automobile coming within the United States or its transportation of liquor, and that said claimant knew absolutely nothing about the same in any way, and honestly believed that said automobile was then and there being used in and about Vancouver, British Columbia, for taxicab purposes only, until he learned that it had been seized by the deputy collector of customs of the United States.

“CONCLUSIONS OF LAW

I

“That the automobile referred to herein is not subject to forfeiture under section 3082 Revised Statutes of the United States, or at all; that claimant, Angelo Gularas, is an innocent owner of said automobile, and not connected in any way with the bringing of said automobile into the United States, which said car was brought into the United States without the knowledge, acquiescence or consent of said claimant, Angelo Gularas, and that at the time said automobile crossed the International Boundary line from British Columbia, Canada, into the United States of America, and into the State of Washington, said Angelo Gularas, claimant herein, honestly believed that said automobile was being run and operated as a taxicab and for that purpose

only in the city of Vancouver, British Columbia, and that the said Angelo Gularas was innocent of any wrong or wrongdoing in the premises.

II

“That as said automobile was engaged in the importation of prohibited alcoholic liquor at the time of its seizure in the United States, it was not engaged in the importing of any merchandise, and was and is not subject to forfeiture under the customs law of the United States.

III

“That said automobile at the time of its entry into the United States of America, as well as at the time of its seizure as aforesaid, was not, merchandise, and that said automobile was wrongfully seized by the United States Government officials and that forfeiture of the same should not be had, and that said automobile should be delivered to claimant, Angelo Gularas, free of costs and charges.

. . . .

“ORDER AND DECREE

“IT IS ORDERED, ADJUDGED and DECREED that the information of libel for forfeiture herein be, and the same hereby is dismissed with prejudice,

“Done in open court this January 24, 1922.

“EDWARD E. CUSHMAN,
“Judge.”

(Transcript of Record, 36 to 41, inc.)

The substance of the foregoing quotation being likewise set forth in the Bill of Exceptions. (Transcript of Record, 55 to 59, inc.)

□ □ □

ARGUMENT AND AUTHORITIES

Appellee maintains that this auto, under the peculiar circumstances surrounding this transaction, is not merchandise; appellee was and yet is its bona fide owner and verily believed this auto was being used as a taxi in Vancouver, British Columbia when seized.

This auto certainly was converted, and we assert technically stolen by Roberts—if Roberts had brought this auto into the United States without arrest, or had taken it from Vancouver to Calgary, or any other city or country he could have been, under the existing circumstances, arrested for theft; the theft was complete by Roberts when he placed the whiskey in this automobile and left the city of Vancouver.

“It was further admitted that Roberts received, concealed, and transported, and aided in the concealment and transportation of said auto-

mobile within the jurisdiction of said district court in Whatcom County, Washington. . . ." (Transcript of Record [Bill of Exceptions] page 56.)

True, Roberts was arrested by the sheriff of Whatcom County, upon his entry into the United States from Canada, as is more clearly shown by claimant's exhibit "C," a portion of which is as follows:

"Bellingham, Washington,
May 3, 1921.

"COLE & DOLBY,
Seattle, Washington.
Gentlemen :

"Replying to your letter of May 2, 1921, regarding certain matters connected with the arrest and seizure of John Doe Rogers, alias James Roberts, and a McLaughlin car, bearing British Columbia license No. 17893, engine No. 487067, report as follows, viz: Our records shows John Doe Rogers, alias J. M. Roberts, arrested October 1, 1920, sentenced October 14, 1920. Fined \$500.00, costs \$4.40, and thirty (30) days' jail sentence. Paid fine and costs and served time. Released October 30, 1920. Charged with illegal possession (two counts). Above mentioned car turned over to federal authorities, October 28, 1920. . . .

"A. L. CALLAHAN, *Sheriff.*
"By J. B. BENNETT, *Deputy.*"

The only objection made to the introduction of this evidence by the Government's counsel was ". . . it is purely a question of admissibility," (Statement of Facts, page 73), and we take it this objection was waived as it is not insisted upon in the Government's brief; hence the evidence also shows that this man Roberts was by the state authorities arrested, fined and jailed; the automobile in question was also seized by the state authorities on about October 1, 1920, and after being in possession of the sheriff of Whatcom County for twenty-eight (28) or thirty (30) days was turned over to the United States authorities.

It is admitted by the Government and claimant, that Roberts, in violation of his trust, put whiskey in this automobile, left Vancouver for the United States, came across the line and did not report or declare on this automobile nor the whiskey, and was subsequently arrested as hereinbefore stated; that this automobile came into this country ". . . on its own power," (Transcript of Record, page 63), and "that it was driven into said state for temporary purposes only, and with the purpose and intent of returning said automobile to Vancouver, British Columbia." (Transcript of Record, paragraph V, page 26.) (Claimant's answer.)

"MR. COLE: Yes, well the only thing we care to introduce outside of the admissions, so to speak, that if Mr. Gularas was here he would testify substantially to the matters set forth in our answer. . . ." (Statement of Facts, page 12.)

"MR. FRATER: . . . I do admit that Mr. Gularas would testify in accordance with the affirmative matter contained in his claim.

"THE COURT: You have no opposing evidence?

"MR. FRATER: No, I have no opposing evidence. . . ." (Statement of Facts, page 22.)

Thus it will be observed that the Government's learned counsel is honestly mistaken when he states in his brief, pages 4 and 5:

". . . there is not a scintilla of evidence given to show that it was in fact the purpose of the driver of the automobile to return the same to Canada, whence he came. The intent on the part of the driver to return this automobile to Canada was merely assumed by the court."

We repeat this automobile is not merchandise, and the case of *U. S. vs. One Sorrel Horse*, No. 15,953, 27 Fed. cases, 315, is so in point that it could truthfully be said "it is on all fours."

"This was an information against a horse seized as forfeited for having been imported or brought from Canada into the United States in

violation of the revenue laws thereof. . . . the horse was driven by the claimant, harnessed before another horse, . . . from Canada into the district of Vermont, not for sale or to be kept in the country for use, but in the prosecution of a journey to the State of Maine, on business of a temporary nature, with the intention of returning with the horses and sleigh to the claimant's place of residence in Canada, immediately after the accomplishment of his business. The question was, whether, upon the facts so found, there having been no report or entry made, manifest delivered, or duties paid, the horses was liable to seizure and forfeiture. . . .

"PRENTISS, District Judge: The forfeiture claimed . . . must be claimed under the provisions of the act of 1821 . . . The first section of the act of 1821 is broad enough to embrace, and undoubtedly does embrace, every mode whatever of importing or bringing into the United States, from adjacent foreign territory, merchandise subject to duty, either by land or by water. It provides, that every person, coming into the United States from an adjacent foreign country, with merchandise subject to duty, shall deliver at the office of the collector of customs a manifest of the merchandise; and, on neglect to do so, the merchandise, imported or brought in, shall be forfeited. Horses may not be usually included in the term 'merchandise,' but being objects of trade and commerce, they may be called merchandise, within the meaning and intention of the act, whenever they are imported or brought into the country as such. A horse brought

from an adjacent foreign territory into the United States for the purpose of sale, or of being kept there either for use or sale, horses being subject to duty, is within the sense and object of the act. But a horse brought in, not for any such purpose, but as a mere instrument of conveyance in the prosecution of a temporary journey on business, or a visit, is not brought in as merchandise, and is therefore not within the purview of the act. To hold otherwise would be to adopt a construction, which would not only be particularly embarrassing and vexatious in its effects upon the ordinary intercourse between the residents on the opposite sides of the frontier line, but would be productive of much inconvenience in its more general operation. The case under consideration, then, on the facts found by the jury, being not within the meaning, intention, or policy of the act, the horse in question was not subject to seizure and forfeiture. It was said in argument, that this construction of the act would open the way to fraudulent evasions of the law, and expose the officers of the customs to peril in the execution of their duties. . . . There must be judgment therefore on the verdict for the claimant."

This decision is cited but once, and that is in 17 Wall. (84 U. S.) 93, 21 L. Ed. 613 on 617, on another point.

The provisions mentioned in the above quotation are substantially the same as in section 3082 which says:

"If any person shall fraudulently or knowingly import or bring into the United States any merchandise contrary to law, such merchandise shall be forfeited, and the offender shall be fined."

Merchandise is also defined as follows:

"The term 'merchandise' is, I think, used in its mercantile sense only. Horses and trucks may, indeed, be merchandise. They are so, in a mercantile sense, when shipped or put aboard a vessel as merchandise; but when they are driven aboard in charge of their drivers, who are passengers, and remain in their charge upon the trip, they are not shipped, taken in, or put on board as 'merchandise.'" (The Garden City, 26 Fed. 766 on 770.)

On February 25, 1921, Honorable Edward E. Cushman had submitted to him a case where substantially the same facts were set forth as in the instant case, and on November 8, 1921, Honorable Jeremiah Neterer had submitted to him a case where substantially the same facts were set forth as in the instant case, wherein each of said judges held in favor of the respective claimants, and since we have not been able to find that either of these cases have been reported, we will set out the opinions of said judges in full, to-wit:

"IN THE DISTRICT COURT OF THE UNITED
STATES, WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION

UNITED STATES OF AMERICA,
Libelant, } No. 5700
— VS — }
ONE HUDSON SIX-CYLINDER
AUTOMOBILE, Serial No.
3563, British Columbia Li- }
cense No. 17265, MEMORANDUM
Respondent. } DECISION
Filed February
25, 1921

Hon. Robert C. Saunders, U. S. Attorney,
Hon. R. E. Capers, Assistant U. S. Attorney,
For Libelant
Bausman, Oldham, Bullitt & Eggerman,
For Claimant
CUSHMAN, District Judge:

"The strayed cattle case (*U. S. vs. 85 Head of Cattle*, 205 Fed. 679 at 681) is in point to this extent: Judge Bourguin points out in it the friction liable to arise in a foreign country—the bitter feeling liable to be excited by any harsh practice or interpretation in the enforcement of the customs law, and reprisals taken to the disadvantage of our own citizens—there concludes that comity between neighboring nations justifies liberality in interpreting the statutory rule.

"In the matter of customs duties on imported merchandise, we have largely to do with people from foreign countries who can not be expected to have the same familiarity with our laws as our own citizens have. Our citizens and residents of this country alone are concerned, generally, with those businesses which are regulated by the internal revenue laws. Hence there is justification for a more liberal and considerate practice or rule in the administration and interpretation of the customs law than in the internal revenue.

"The only province of the court is to determine what the law is. Congress in protecting the equities of bona fide and innocent vehicle owners under the Volstead Act, which act prohibited the transportation into the United States of intoxicating liquor, containing over one-half of one per cent alcohol by volume and fit for beverage purposes, as well as its transportation within the country, which necessarily follows that, if it be determined that this automobile was used for the purpose of bringing such liquor into the United States, that claimant herein is entitled to prevail, for the court finds it to have been innocent in all respects in this transaction.

"It cannot be that Congress ever contemplated that a person smuggling liquor into the United States would appear at the customs house and declare his automobile and offer it for examination and inspection to the customs officers. The same would be true regarding any and all other vehicles so used.

"The court in the present case places its decision on the authority of *U. S. vs. 1,150½ Pounds of Celluloid* (82 Fed. 627).

"The Government proceeds against the automobile in the present case as merchandise brought into the United States in violation of law, the forfeiture of which is condemned under section 3082 R. S. (Comp. Stat. 5785). In order for it to prevail, its forfeiture must then be shown to be as merchandise and not as a vehicle engaged in an illegal importation.

"There is this reason occurring to the court as shown why Congress may have intended a more drastic rule for the condemnation and forfeiture of the vehicle when used in the illegal importation of merchandise generally than would obtain in case of the bringing in of a vehicle as merchandise. The vehicle is not, ordinarily, a thing of any great value, whereas the value of the merchandise, which might be illegally brought into the United States, or transported within the United States might be exceedingly large and out of all proportion and relation to the actual value of the vehicle.

"As a vehicle engaged in such transportation, the automobile, itself, would be an instrument of wrong—it is a guilty thing and not the subject of a wrong, merchandise, it is an innocent thing, forfeited as a means of punishing the guilty individual. As a vehicle engaged in such transportation, it is, itself, considered guilty. It is guilt of the latter character. That is the basis of the decision in *J. W.*

Goldsmith, Jr.-Grant Co. vs. U. S. (Supreme Court Decision No. 214, decided January 17, 1921.)

“Decree for Claimant.”

“IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

UNITED STATES OF AMERICA,
Libelant,

— VS —

ONE STUDEBAKER AUTOMOBILE, Engine No. B. F. 13463, British Columbia License No. 23154; King County, Washington, License No. 4840, together with its accessories, furniture, apparel and equipment,
Respondent.

No. 6005

Decision filed November 8, 1921

Thos. P. Revelle, U. S. Attorney,

Attorney for U. S.

Kellogg & Thompson,

Attorneys for Claimant,

William D. Sowerby.

NETERER, District Judge:

“The claimant, William D. Sowerby, operates an auto delivery in Vancouver, B. C., and hires automobiles to persons who personally drive such cars. On the day in question F. C. Johnson hired from

the owner the car in issue to drive from Vancouver to New Westminster and return, both in British Columbia. Johnson diverted the car from the purposed trip, and drove to the United States and on entering violated the custom laws, and the car was seized and forfeiture is prayed.

"That the car was wrongfully imported in violation of section 3082 R. S. section 5785 C. S. is established. It is clear that the owner, so far as the record discloses, was innocent of any purpose of infraction of the customs law. When Johnson diverted the car to the United States, instead of confining it to the trip for which it was hired, his possession became wrongful. The possession at the time of entry being wrongful, and no misconduct or negligence on the part of the owner appearing, the act of Johnson cannot forfeit the car as against the true owner. *Kainit*, 37 Fed. 326. *Prisch vs. Ware*, 4 Cranch 347; *Lady Essex*, 39 Fed. 767. The cases cited by plaintiff are cases where the forfeited property was in the lawful custody of the person violating the law, but used for an unlawful purpose. This was the status in *U. S. vs. Chandler automobile*, decided by this court April 9, 1919.

"NETERER, Judge."

The authorities cited by the Government's counsel as an abstract proposition of law, and when applied to apropos fact are germane to those facts; but they do not apply to nor fit the facts of the instant case—here is an automobile owned by a

Canadian, converted,—stolen—by a foreigner, an instrument of conveyance only, fraudulently driven from a foreign country with contraband goods, into the United States with the intention of returning to its home port when discharged of its cargo—goods, not even merchandise.

The last two cases cited in the brief of the Government's counsel are far afield when applied to the facts in this case; at the trial, the Government's counsel was somewhat of the same opinion as he states, statement of facts, page 15:

"Now I have found and located another citation, namely in the case of the *United States vs. One Black Horse, et al.*, in 147 Fed. 770, which holds that a horse and wagon used in the transportation of smuggled merchandise is forfeited. Of course that is a little different from this case."

True, the facts are quite different from the instant case, as well as are the facts in 129 Fed. 167. Neither of those cases were prosecuted under R. S. section 3082.

These two cases cited by the learned counsel for the Government are, in our opinion, overruled in re; *U. S. vs. One Paige Automobile, et al.*, 277 Fed. 524, that court holding in substance that the Government should proceed under section 26 of

title 2 of the Volstead Act (41 Stat. 315), the Government in that case taking the position that they had a right to insist upon a forfeiture under either law applicable, to-wit: section 26 of the Volstead Act or the customs law (38 Stat. 114).

Even though it be held that these two decisions are not overruled, and that section 3082 of the Revenue Law is the proper one to proceed under, the case of *U. S. vs. One Automobile*, 237 Fed. 891, holds to the contrary. We quote only a portion of the syllabus:

“An Indian was given possession of a motor car under a conditional contract of sale, used the machine for the purpose of introducing intoxicating liquor into Indian country, held that only his interest in the car could be forfeited.”

A kindred decision is found in, and an affirmation of this principal is determined by the Circuit Court of Appeals, Eighth Circuit, *Shawnee National Bank vs. U. S.*, 249 Fed. 583. The syllabus in that case saying in part:

“It is a principle of natural law and justice that statutes will not be held to forfeit property except for the fault of the owner or his agents, unless such a construction is unavoidable.”

The same principal is laid in *U. S. vs. 1,150½ Pounds of Celluloid*, 82 Fed. 627, Circuit Court of Appeals, Sixth Circuit, and was heard "Before Taft and Lurton, circuit judges . . ." Opinion written by Justice Lurton.

District Judge Bourguin in speaking of forfeitures says:

"Forfeitures are odious, and to be declared only when clearly imposed by statute. When they are claimed against those whose only offense is that they lawfully intrusted their property to others who betrayed the trust and diverted the property to unlawful uses, it must be very clear indeed that the owners are within both the latter and spirit of the statute, or the claim must be disallowed. The statute herein has no application to the property of Matt's parents. The whiskey of Grandjo and the horse of James Matt are alone declared forfeited. The parents of Matt will have judgment. The seizure of their property was with probable cause, however, and upon reasonable grounds; and a certificate thereof will be entered."

U. S. vs. Two Gallons of Whiskey, 213 Fed. 986 on 988.

Again we cannot subscribe to the doctrine that the Government has any right after the state has arrested the driver, fined and imprisoned him and held the automobile for twenty-eight days, to then

two days before the driver is released, deliver this automobile to the Government for seizure and forfeiture, and which was seized on November 6th, as set forth in paragraph V of the libel (Transcript of Record, page 4)—said libel being verified on November 29, 1920.

We maintain that the construction placed upon section 3082 by the Government is not warranted so long as another construction is possible, and that the judgment of the Honorable Nisi Prius Court should be affirmed.

Respectfully submitted,

GEO. B. COLE, and

JOHN WESLEY DOLBY,

Seattle, Washington.

J. D. MCPHEE, Vancouver, B. C.

Attorneys for Appellee.

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
SERIAL NUMBER 514874, ENGINE NUM-
BER 487067, BRITISH COLUMBIA LI-
CENSE NUMBER 17893, *Respondent.*

ANGELO GULARAS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. EDW. E. CUSHMAN, *Judge.*

BRIEF FOR THE APPELLANT.

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney.
Attorneys for Appellant.

Office and Postoffice Address: 310 Federal Building,
Seattle, Washington.

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ONE McLAUGHLIN TOURING AUTOMOBILE,
SERIAL NUMBER 514874, ENGINE NUM-
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. EDW. E. CUSHMAN, *Judge.*

BRIEF FOR THE APPELLANT.

STATEMENT.

By libel of information for forfeiture the United States libelled a McLaughlin automobile manufactured in the Dominion of Canada for the reason that the same was on or about the 2nd day of October, 1920, unlawfully imported into the

United States. The libel specifically described the automobile and alleged that it was merchandise subject to duty and that one Jim Roberts, alias John Doe Rogers, on the date mentioned did fraudulently and knowingly import the same and receive and conceal and transport the same in the United States knowing that the same had been unlawfully imported from a foreign country, and the libel further averred and alleged the seizure by the proper Customs officers and the appraisal of the said automobile in the sum of Seventeen Hundred Dollars (\$1700.00). In due course the appellee appeared and answered the libel of information and set up certain affirmative matters. In his answer the claimant admitted all of the allegations of the libel save and except that the automobile was merchandise and in his affirmative matter alleged that he was the equitable and legal owner of the automobile, that the same was brought into the United States without his knowledge or information and in violation of an agreement which he had with another who was entitled to possession of the said automobile, and further alleged that the automobile was used on or about the date alleged in the libel for the purpose of importing and conveying a quantity of whiskey from Canada into the United States and that the same was laden with whiskey.

at the time of seizure. In effect, the claimant averred that he was an innocent party and prayed for the dismissal of the libel. Upon a trial the relief prayed for by the claimant was granted. From this decision the Government prosecutes this appeal.

ARGUMENT.

The Government's position may be succinctly summarized by stating that an automobile is merchandise and is subject to forfeiture for illegal importation, and the Government's right to subject such merchandise to forfeiture after the same has been illegally imported may not be denied merely because the equitable or legal title to the merchandise happens to be in an individual who is himself guiltless of wrong doing.

Section 2766 R. S. defines merchandise as being

“goods, wares and chattels of every description capable of being imported.”

Merchandise has been defined as goods capable of lawful importation.

U. S. v. Sischo, 270 Fed. 958.

Certainly it may not be gainsaid that automobiles have frequently been imported, and in any

event in this case appellee did not raise the question of importation but merely denied that the automobile in question was merchandise. It would further appear that an automobile is merchandise, otherwise Congress would not have enacted the statute which provides for the specific amount of tariff which is due upon automobiles, namely:

38 Stats. at Large, page 125;
Sec. 5291, paragraph 119 Comp. Stats.

An automobile is dutiable merchandise.

U. S. v. Archer & Co., 168 Fed. 242.

Under Section 3100 R. S. it is the duty of a driver of an automobile to report the same together with its contents to the proper Customs officer upon arrival in this country. One bringing an automobile into the United States and failing to do so violates the law.

Estes v. U. S., 227 Fed. 818.

It may be noted that the automobile was brought into the United States without compliance with this statute and it may be further noted and observed that there is not a scintilla of evidence tending to show that it was in fact the purpose of the driver of the automobile to return the same to Canada whence he came. The intent on the part

of the driver to return this automobile to Canada was merely assumed by the Court.

The automobile which the Government seeks to forfeit is and was lawful merchandise and the Government predicates its libel of information for forfeiture upon Section 3082 R. S., which is a straight Customs forfeiture statute. Under the statute just quoted the automobile being merchandise illegally imported was subject to forfeiture.

Keck v. U. S., 172 U. S. 434;

U. S. v. Chesbrough, 176 Fed. 778;

Estes v. U. S., 227 Fed. 818;

U. S. v. 50 Waltham Watch Movements, 139 Fed. 291;

U. S. v. Caminata, 194 Fed. 903;

U. S. v. 25 Pictures, 260 Fed. 853.

The claimant herein earnestly insists that the forfeiture should not be had for the reason that he had no knowledge of the illegal importation and that had he been advised of it he would not have permitted the same and that he is innocent of any wrongdoing, and that the operation of Section 3082 R. S. would work an unnecessary and unfair hardship upon an innocent person. Mr. Gularas, the claimant herein, is undoubtedly an honest man and innocent of wrongdoing, and it may be that

he may suffer as a result of the dishonesty of one with whom he contracted or dealt. However, we have the customs and revenue laws of the United States and the revenues of the United States must be maintained.

It has been held that a vehicle illegally imported is liable to forfeiture without regard to the innocence or guilty knowledge of the owner.

U. S. v. One Black Horse, 129 Fed. 167;
U. S. v. One Black Horse, 147 Fed. 770.

The case last above quoted even holds that a horse and wagon used in the transportation of smuggled merchandise is forfeitable regardless of the fact that the owner and its driver did not have knowledge of the purpose for which it was being used. If the law were not so great opportunities would be presented for collusion between those deciding to smuggle goods into the United States and persons holding dummy or fraudulent conditional sales contracts or mortgages upon the vehicle used in the importation.

It is, therefore, respectfully averred that an automobile is merchandise and that when the same has been illegally imported into the United States it may be forfeited to the United States regardless

of the title or equitable interest of an innocent owner.

Respectfully submitted,

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney.

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LAM FOOK YOU,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

MAY 29 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

LAM FOOK YOU,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Petitioner and Appellant:

M. A. THOMAS, Esq., Humboldt Bank Bldg.,
San Francisco, California.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-
cisco, Calif.

In the Southern Division of the United States Dis-
trict Court, in and for the Northern District
of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU on Habeas Cor-
pus.

Praecipe for Transcript on Appeal.

To the Clerk of the Above Court:

Please prepare and certify the record on appeal
in the above-entitled matter, to be composed of the
following papers:

- (1) Petition for writ of habeas corpus;
- (2) Order to show cause;
- (3) Demurrer of respondent;
- (4) Judgment and order sustaining demurrer
and denying petition for discharge on writ of ha-
beas corpus;
- (5) Notice of appeal;
- (6) Petition for appeal;
- (7) Assignment of errors;
- (8) Order allowing appeal;

(9) Stipulation and order for withdrawal of immigration records;

(10) Citation on appeal; and

(11) Clerk's certificate as to record on appeal.

Dated: May 4th, 1922.

M. A. THOMAS,
Attorney for Petitioner and Appellant.

[Endorsed]: Receipt of copy of the within praecipe for transcript on appeal is hereby admitted this 4 day of May, 1922.

JOHN T. WILLIAMS,
U. S. Attorney for Respondent and Appellee.

Filed May 4, 1922. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [1*]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LAM FOOK YOU (19730/28-6
Ex. SS. Nanking 11/27/20), on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable, United States District Judge, now Presiding in the United States District Court, in and for the Northern District of California, First Division:

*Page-number appearing at foot of page of original certified Transcript of Record.

It is respectfully shown by the petition of the undersigned that Lam Fook You, hereafter in this petition referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and April 29th, 1902, as amended and re-enacted by section 5 of the Deficiency Act of April 7th, 1904, which said Acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China. [2]

That the said Commissioner claims that the said detained arrived at the Port of San Francisco on or about the 27th day of November, 1920, on the S. S. "Nanking," and thereupon made application to enter the United States as the son of a native-born citizen thereof, and that the application of the said detained to enter the United States as a

citizen thereof was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration, to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in the statutes.

But, on the contrary, your petitioner, on his information and belief alleges that the hearing and proceedings had herein, and the action of the said Commissioner, and the action of the said Secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes, and that the denial of the application of the said detained to enter the United States as the son of a native-born citizen thereof, was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

Your petitioner alleges upon his information and belief that the evidence presented before the immigration authorities upon the application of the said detained to enter the United States, which said evidence is now hereby referred to with the

same force and effect as if set forth in full herein, was of such conclusive kind and character establishing the birth of the father of the [3] detained within the United States, and hence showing the said detained to be the son of a native-born citizen thereof, and which said evidence was of such legal weight and sufficiency that it was an abuse of discretion on the part of the said Commissioner and the said Secretary to deny the said detained the right to admission into the United States and instead thereof to refuse to be guided by said evidence, and the said adverse action of the said commissioner and the said Secretary was, your petitioner alleges upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of his case to which he was entitled. Said action was done in excess of the discretion committed to the said Secretary and the said Commissioner of Immigration. And your petitioner further alleges upon his information and belief, that the said action of the said Secretary and the said Commissioner was influenced against the said detained and against his witnesses solely because of his being of the Chinese race.

That your petitioner has not in his possession the whole of the said proceedings had before the said Commissioner and the said Secretary of Labor, but has in his possession and offers as a part thereof, as a separate exhibit and marked Exhibit "A," a partial record of such proceedings, and your petitioner alleges his willingness to incorpor-

ate and have considered as part and parcel of his petition, the whole of said immigration record when the same shall have been received from the Secretary of Labor at Washington, and have it presented to this Court at the hearing to be had hereon.

That it is the intention of the said Commissioner to deport the said detained out of the United States, and away from the land of which he is a citizen, by the S. S. "Nile," sailing from the Port of San Francisco on the 26th day of May, 1921, unless this Court intervenes to prevent said deportation. [4]

That the said detained is in detention as aforesaid, and is a minor of tender years and for that reason is unable to verify this petition upon his own behalf, and for that reason this petition is verified by his father, your petitioner herein, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without day.

Dated: San Francisco, California, May 21st,
1921.

LAM KIM TONG,
Petitioner.

M. A. THOMAS,

Attorney for Petitioner, 502 Humboldt Bank Bldg., 785 Market Street, San Francisco, California.

[5]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LAM KIM TONG,
Petitioner.

Subscribed and sworn to before me this 21st day of May, 1921.

[Seal] J. D. BROWN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 21, 1921. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[6]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LAM FOOK YOU (19730/28-6
Ex SS. Nanking 11/27/20) on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition herein,—

IT IS ORDERED that Edward White, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 28th day of May 1921, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for, and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever acting under the orders of the said Commissioner or the Secretary of Labor, shall have the custody of the said Lam Fook You, are hereby ordered and directed to retain the said Lam Fook You within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated: San Francisco, California, May 21st,
1921.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 21, 1921. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[7]

In the Southern Division of the United States Dis-
trict Court for the Northern District of Cali-
fornia, First Division.

No. 17,223.

In the Matter of LAM FOOK YOU, on Habeas
Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Comes now the respondent, Edward White, Com-
missioner of Immigration, at the Port of San Fran-
cisco, in the Southern Division of the Northern
District of California, and demurs to the petition
for a writ of habeas corpus in the above entitled
cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts suffi-
cient to entitle petitioner to the issuance of a writ
of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the
statements therein relative to the record of the
testimony on the trial of the said applicant are
conclusions of law and not statements of the ulti-
mate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed July 2, 1921. W. B. Mal-
ing, Clerk. By Lyle S. Morris, Deputy Clerk.
[8]



In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 17,223.

In the Matter of LAM FOOK YOU, on Habeas Corpus.

(Order Sustaining Demurrer to and Denying Petition for a Writ of Habeas Corpus.)

M. A. THOMAS, Esq., Attorney for Petitioner.

JOHN T. WILLIAMS, Esq., United States Attorney, and BEN F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT
OF HABEAS CORPUS.**

The demurrer to the petition for a writ of habeas corpus herein is sustained, and said petition is denied.

March 6th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 6, 1922. W. B. Mal-
ing, Clerk. By C. W. Calbreath, Deputy Clerk.
[9]

In the Southern Division of the United States Dis-
trict Court in and for the Northern District
of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU, on Habeas
Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to
Hon. JOHN T. WILLIAMS, United States
Attorney for the Northern District of Califor-
nia:

You and each of you will please take notice that
Lim Fook You, the petitioner and the detained
above named, does hereby appeal to the Circuit
Court of Appeals of the United States, for the
Ninth Circuit thereof, from the order and judg-
ment made and entered herein on the 6th day of
March, 1922, sustaining the demurrer to and in
denying the petition for discharge on a writ of
habeas corpus filed herein.

Dated: San Francisco, California, March 11th,
1922.

M. A. THOMAS,
Attorney for Detained and Petitioner. [10]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU, on Habeas Corpus.

Petition for Appeal.

Now comes Lim Fook You, the petitioner, and the appellant, herein named, and says:

That on the 6th day of March, 1922, the above-entitled court made and entered its order sustaining the demurrer to the petition for a writ of habeas corpus and denying the petition for discharge as prayed for and on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in

the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof; and further, that the appellant and detained be admitted to bail during the pendency of the appeal herein, upon giving a bond before a Commissioner of this Court in the sum of one thousand dollars (\$1,000), conditioned [11] that he will return and surrender himself in execution of whatever judgment may be final herein.

Dated: San Francisco, California, March 11th, 1922.

M. A. THOMAS,

Attorney for Petitioner and Appellant Herein.
[12]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU, on Habeas Corpus.

Assignment of Errors.

Comes now Lim Fook You, by his attorney, M. A. Thomas, Esq., in connection with his petition for an appeal herein, and assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will

rely upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First: That the Court erred in sustaining the demurrer to the petition for a writ of habeas corpus herein.

Second: That the Court erred in denying the petition for discharge of the detained and appellant herein.

Third: That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

Fourth: That the Court erred in not holding that the Commissioner of Immigration and the Secretary of Labor acted beyond their statutory authority and without jurisdiction in denying the application of the detained to enter the United States, he having furnished evidence satisfactory and establishing his status as the son of a native born citizen of the United States [13]

Fifth: That the Court erred in not holding that the action of the said Commissioner and the said Secretary in denying the application of the detained to enter the United States was an abuse of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statute.

Sixth: That the Court erred in holding that the evidence presented before the immigration authorities upon the application of the detained to enter the United States was not of such conclusive kind and character establishing the birth of the father

of the detained within the United States, and showing that the detained is the son of a native-born citizen thereof. That it was an abuse of discretion on the part of the said Commissioner and the said Secretary to deny the said detained the right to admission into the United States, and to refuse to be guided by said evidence.

Seventh: That the Court erred in holding that the said Commissioner and Secretary did not deny the detained a fair hearing and consideration in this case, to which he was entitled under the law.

WHEREFORE, the appellant prays that the judgment and order of the Southern Division of the United States District Court, for the Northern District of California, First Division, made and entered herein in the office of the clerk of said court on the 6th day of March, 1922, discharging the order to show cause and sustaining the demurrer, and in denying the petition for a writ of habeas corpus, be reversed, and that this cause be remitted to the said lower court with instructions to discharge [14] the said Lim Fook You from custody, or grant him a new trial before the lower court, by directing the issuance of the writ of habeas corpus as prayed for in said petition.

Dated: San Francisco, Cal., March 11th, 1922.

M. A. THOMAS,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Mar. 11, 1922, W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [15]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 11th day of March, 1922, came Lim Fook You, the detained herein, by his attorney, M. A. Thomas, Esq., and having previously filed the same herein, did present to this court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and deportation stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, Cal., March 11th, 1922.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Mar. 11, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 17,223.

In the Matter of LIM FOOK YOU, on Habeas Corpus.

Stipulation and Order for Withdrawal of Immigration Records.

It is hereby stipulated and agreed by and between the respective parties hereto, through and by their attorneys herein, that the original immigration records in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified by the clerk of this Court.

Dated: San Francisco, Cal., March 25, 1922.

M. A. THOMAS,

Attorney for Appellant and Petitioner.

JOHN T. WILLIAMS,

U. S. Attorney for Respondent and Appellee
Herein. [17]

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ORDERED that the said Immigration Records therein referred to may be withdrawn from the office of the clerk of this court and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this court.

Dated: San Francisco, Cal., May 4th, 1922.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: Receipt of copy of the within stipulation and order for withdrawal of immigration records, is hereby admitted this 4 day of May, 1922.

JOHN T. WILLIAMS,
U. S. Attorney for Respondent and Appellee
Herein.

Filed May 4, 1922. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [18]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 18 pages, numbered from 1 to 18, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Lam Fook You, on Habeas Corpus, No. 17,223, as the same now

remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is included in this transcript) and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Six Dollars and Eighty-five Cents (\$6.85), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, (page 20).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of May, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [19]

Citation on Appeal.

UNITED STATES OF AMERICA—ss.
The President of the United States, to Hon. EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco, and to JOHN T. WILLIAMS, United States Attorney for the Northern District of California, His Attorney Herein, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals,

for the Ninth Circuit, to be holden at the city and county of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the Southern Division of the United States District Court for the Northern District of California, wherein Lim Fook You is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 4th day of May, 1922.

M. T. DOOLING,

United States District Judge. [20]

Receipt of copy of the within citation on appeal is hereby admitted this 4th day of May, 1922.

JOHN T. WILLIAMS,

U. S. Attorney for Respondent and Appellee.

[Endorsed]: No. 17,223. In the Southern Division of the United States District Court, in and for the Northern District of California, First Division. In the Matter of Lim Fook You, on Habeas Corpus. Citation on Appeal. Filed May 4, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3873. United States Circuit Court of Appeals for the Ninth Circuit. Lam Fook You, Appellant, vs. Edward White, as Commis-

sioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record, Upon Appeal From the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed May 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

**Certificate of Clerk U. S. District Court to Original
Exhibits.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits, known as and marked:

Respondent's Exhibit "A" (Immigration Records),	
Respondent's Exhibit "B"	"
Respondent's Exhibit "C"	"
Respondent's Exhibit "D"	"
Respondent's Exhibit "E"	"
Respondent's Exhibit "F"	"
Respondent's Exhibit "G"	"
Respondents Exhibit "H"	"

—are the original exhibits filed in the Matter of Lam Fook You, on Habeas Corpus, No. 17,223, and are transmitted herewith in accordance with a stipulation and order of Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of May, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk.

[Endorsed]: No. 17,223. In the Southern Division of the U. S. District Court, Northern District of California, First Division. In the Matter of Lam Fook You on Habeas Corpus. Certificate to Original Exhibits.

No. 3873. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 11, 1922. F. D. Monkton, Clerk.

No. 3873

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAM FOOK YOUNG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

M. A. THOMAS,

Attorney for Appellant.

FILED

OCT 16 1922

F. D. MONOKTON,
CLERK

No. 3873

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

LAM FOOK YOO,

vs.

Appellant,

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

I.

Statement of Facts.

The appellant upon arriving at the port of San Francisco from China made application to enter the United States as a citizen, claiming to be the foreign born son of Lam Kim Tun, a citizen of the United States whose citizenship was satisfactorily established by court papers. The application of appellant was denied after a hearing before a board of special inquiry, it being contended by the immigration authorities that he was not the son of Lam Kim Tun, and upon appeal to the Secretary of Labor the decision of the board was affirmed.

Upon habeas corpus proceedings the District Court sustained a demurrer to the petition of appellant for a writ of habeas corpus, and denied appellant's petition for discharge. From that judgment the appellant takes this appeal.

II.

Questions Involved.

Appellant has assigned as error:

First: That the court erred in sustaining the demurrer to the petition for a writ of habeas corpus herein.

Second: That the court erred in denying the petition for discharge of the detained and appellant herein.

Third: That the court erred in holding that it had no jurisdiction to issue a writ of habeas corpus as prayed for in the petition herein.

Fourth: That the court erred in not holding that the Commissioner of Immigration and the Secretary of Labor acted beyond their statutory authority and without jurisdiction in denying the application of the detained to enter the United States, he having furnished evidence satisfactory and establishing his status as the son of a native born citizen of the United States.

Fifth: That the court erred in not holding that the action of the said Commissioner and the said

secretary in denying the application of the detained to enter the United States was an abuse of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statute.

Sixth: That the court erred in holding that the evidence presented before the immigration authorities upon the application of the detained to enter the United States was not of such conclusive kind and character establishing the birth of the father of the detained within the United States, and showing that the detained is the son of a native-born citizen thereof. That it was an abuse of discretion on the part of the said Commissioner and the said Secretary to deny the said detained the right to admission into the United States, and to refuse to be guided by said evidence.

Seventh: That the court erred in holding that the said Commissioner and Secretary did not deny the detained a fair hearing and consideration in this case, to which he was entitled under the law.

III.

Argument.

The reasons for denying the application of the petitioner to enter the United States as the son of Lam Kim Tun are set forth fully in the statements of the chairman of the board of special inquiry, which statements appear fully in the record.

These reasons are restated by the Assistant Commissioner General in his decision dated April 22, 1921, also appearing fully in the record. The decision to exclude is based on nine alleged discrepancies in the testimony and three additional reasons. I will review these discrepancies and additional reasons briefly:

(1) The father testifies that the applicant was born in August, 1913, and was at the time of the hearing seven years old.

The board of inquiry says after observation that he is eleven or twelve years of age, and Dr. P. J. Hickey in a written statement which appears in the record says he is within one year either way of ten years. Neither the report of the physician nor the opinion of the board of inquiry is supported by any scientific data whatever.

See *Woo Hoo v. White*, 243 Fed. 543, where this court says:

“The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that ‘his age is within one year either way of 23 years’. It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a question the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years.”

With regard to the question of age, the assistant Commissioner in his opinion says:

“Standing alone in an otherwise favorable case this one circumstance would hardly be sufficient to justify exclusion.”

The Commissioner then proceeds to enumerate a series of other circumstances and to array them against the applicant, almost everyone of which circumstances should be disregarded, unless it be decided conclusively that the boy is eleven or twelve years of age instead of only seven. It will be seen from a review of these other circumstances that the question of age is really the determining factor, and the board and the Commissioner having determined the question of age adversely to the contention of the applicant and of his father, make that determination conclusive for the reason that without such determination the other circumstances would not be adverse to the applicant's contention.

(2) It is asserted by the chairman of the board and by the Assistant Commissioner that the father testified that his first wife died while he was at home in China on his last trip, while the applicant testified that she died while the father was in the United States.

The father has not testified, and the record does not show he testified, that he was at home when his wife died, and even if he had so testified unless we take it as absolutely proven that the boy is eleven or twelve years of age instead of only seven, he was only four years old when his mother died

and his recollection of that event would not be worth anything.

(3) It is further stated by the chairman of the board and the Assistant Commissioner that the father testified the boy's mother had bound feet, while the applicant testified she had natural feet. It requires no argument to convince this court that if the mother died when the boy was four years old his testimony as to her feet, taken when he was seven years old, would be of no value.

(4) Another discrepancy or point urged against the applicant is that he does not know the names of any of his grandparents. The record shows that they all died long before applicant was born, that his father lived in the United States and had no opportunity to tell him about his ancestors, and that his mother died when he was only four years old, according to his father's testimony.

I urge these points for the purpose of making it clear to this court that except for the unscientific guess that the boy was ten or more years old at the time of his application to enter the United States, these discrepancies are of no importance at all.

(5) The identifying witness Lam Fook Loy testified that he met the applicant and his brother Fong at the See Gew Market before bringing him to the United States. The applicant says he first met the witness at Hong Kong where he went with his brother Fong. This is no discrepancy for on

the face of it it appears that applicant traveled with his older brother from the See Gew Market to Hong Kong, and the presence of Lam Fook Loy would not be impressed upon him until the older brother left him in the sole care of Lam Fook Loy at Hong Kong.

Such testimony might be called a discrepancy if given by an adult or by a child of more mature years, but to hold it against a boy who claims to be seven years old, whose father swears he is seven years old, and who the immigration authorities by observation say is ten years of age or more, is unfair and not in accordance with the fair dealing which should be accorded to citizens of the United States, or even to an alien.

(6) Another point raised by the immigration authorities as a ground for exclusion is a supposed resemblance between the applicant and the additional witness as set forth in the decision to exclude. Such an argument is unworthy of an officer of the government of the United States, and is as unscientific as the guess at the age of the applicant. This supposed resemblance is in line with a theory which was apparently in the minds of the board that the applicant is a son of the alleged father's wife by Huey Lim the additional witness who testified that he carried some money from the father to his wife in 1909 or 1910. There is no doubt but that the decision of the board that the applicant was ten or eleven years old at the time of his application for admission has a direct relation to and is

based upon the date when Huey Lim visited China, to wit, 1909-1910. Such a line of reasoning can only be indulged in by a board of persons determined to prevent the entry of every Chinese applicant by suspicions where evidence is lacking, and is not worthy of a board which is fairly searching for the truth.

(7) The chairman of the board says in his statement that when the father returned from China in 1902 he stated to the immigration authorities that he was not married, and that in 1910 (see file 10387/61) he said he was married to Louie Shee in 1894. The records do show such statements. The chairman further says that when confronted with his former statement the father offered no satisfactory explanation. I do not know what kind of an explanation would be required in order that it be satisfactory to a board which has arrayed the kind of evidence above set forth against this youthful son of an American citizen. It appears that the explanation which was so unsatisfactory to the board was that the father did not remember being asked the question as to whether or not he was married, but asserted that he was married and that if he was not married how could he have any children.

The wonder is that when the records of various examinations to which the parent is subjected upon his successive entries into the United States are all taken together more material discrepancies do not arise, either from a failure to understand the

questions propounded from incorrect interpreting or error in transcribing shorthand notes.

(8) And now we come to the determining discrepancy upon which great importance is placed by the board. Which of the father's five sons is dead? The father says, as appears from the last record, that it is his third son Lam You, while the applicant says it is Lam Shee, the second son. The record shows also that the father stated in 1919 that Lam Shee was dead. An examination of the father's testimony in record No. 18504, 3-7, page 23, shows that he said his third son was dead, and the record in the present case shows that he said, "I forgot their names on account of having the sons deported and I get worried and forget." The fact is, as appears from all the testimony, that the third son is the one who is dead, whether his name be Lam Shee, Lam Youen or Yam You, and it is not surprising that the names should become confused in the father's mind, and that upon repeated questioning he might make a mistake as to one of the names of the deceased.

(9) Another reason set up by the immigration authorities as to why this applicant should be denied admission is that the second wife of the father was deported from the United States as a prostitute. This question has no legal or probative bearing upon the right of appellant here to enter the United States, but is dragged into the record perhaps for the purpose of discrediting his father, and certainly in the hope that it would

prejudice the right of the applicant to enter this country.

(10) The father testified that he first became acquainted with the additional witness Lim Huey Lun in San Francisco in the store of Him Yik Co. on Grant Avenue, San Francisco. The additional witness says he knew the father since the father was three or four years old in the Spanish House on Dupont Street. The board cites this as a discrepancy. The fact is the additional witness, as shown by the record, is five or six years older than the father who went to China when he was only six or seven years old, in 1880 or 1881, and does not remember seeing Lim Huey Lun prior to returning from China in 1902. It is obvious that the older remembers the younger, while the younger does not remember the older. This is no discrepancy, but is seized upon by the board as an additional reason why this applicant should be denied admission to the United States. I might say further that Grant Avenue and Dupont Street are the same street, which fact may or may not have been known by the examining board, but of which fact I think this court is well aware.

(11) The alleged discrepancy concerning how and where the father and the additional witness happened to meet in 1909 is inconsequential. The father says they met in Him Yick Lung Co. on Grant Avenue after a telephone call from Lim

Sing. Lim Sing says they happened to meet outside of Hip Him Yung Co. on Dupont Street. In view of the fact that Grant Avenue and Dupont Street are one and the same, and the stores mentioned are in the same vicinity, it is obvious that they are getting pretty close together in their recollection of an unimportant event which happened ten years before they were called upon to testify in regard thereto.

(12) The final discrepancy relied upon by the board is that the father claims that the additional witness has been working for white people, while the additional witness says he has not worked for white people since 1906. An examination of the record shows that the statement of the father was with reference to the year 1909, and that the witness had worked for white people within three years prior to that date. Both statements may be true without any contradiction.

From the foregoing statement it is clear that the board of special inquiry and the Assistant Commissioner assumed facts which were not in the record, misconstrued the testimony of witnesses, and gave way to matters which were not legal evidence to such an extent as to constitute an abuse of discretion, and to deny the applicant the fair hearing and consideration of his case to which he was entitled. The district court erred in not so holding, and notwithstanding the decision in the

case of *White v. Yung Yen and Yung Soon*, No. 3751, decided by this court on February 6, 1922, I believe that this court should correct the error which has been done and direct that the district court give the appellant a hearing on the merits on his petition for a writ of habeas corpus.

Dated, San Francisco,
October 14, 1922.

Respectfully submitted,
M. A. THOMAS,
Attorney for Appellant.

No. 3873

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LAM FOK YOUNG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of
Immigration at the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE

JOHN T. WILLIAMS,
United States Attorney,

BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellee.

FILED

OCT 27 1922

F. D. MONOKTON

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

LAM FOOK YOU,

Appellant,

vs.

EDWARD WHITE, as Commissioner of
Immigration for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE

STATEMENT OF FACTS.

Lam Fook You, appellant herein, arrived at the port of San Francisco on the S. S. Nanking, November 27, 1920 (Ex. A, p. 46) and made application to enter the United States as a citizen thereof, claiming to be the foreign-born son of Lem Kim Fon, a United States citizen.

His application was denied by a Board of Special Inquiry (Ex. A, p. 28) and an appeal was taken to the Secretary of Labor, Washington, D. C. (Ex. A, p. 44) who affirmed the decision of said Board (Ex. A, p. 54).

Thereafter, to-wit, May 21, 1921, a petition for writ of habeas corpus (Tr. 2) and an order to show cause (Tr. 8) were filed in the District Court.

Thereafter, to-wit, July 2, 1921, a demurrer ^{to} of the said petition was filed (Tr. 9) together with respondent's exhibits, "A, B, C, D, E, F, G, and H," and the matter argued and submitted.

Thereafter, to-wit, March 6, 1922, the demurrer was sustained and the petition denied (Tr. 10).

It is from the order and judgment of the District Court sustaining the demurrer and denying the petition that this appeal is taken.

ARGUMENT.

The petition alleges, and it is assigned as error, that the immigration officials denied the detained the fair hearing and consideration in the case to which he was entitled under the law.

Does not the record show that the hearing or hearings were manifestly unfair?

In support of appellant's right to admission, there was filed the affidavit of the alleged father bearing his photograph and that of the applicant (Ex. A, p. 1), also the affidavit of an identifying witness, Lim Fook Loy (Ex. A, p. 3).

Thereafter, to-wit, January 12, 1921, the alleged father (Ex. A, p. 14), the witness, Lam Fook Loy (Ex. A, p. 11), and the applicant, Lam Fook You

(Ex. A, p. 9) testified before the Board of Special Inquiry, their testimony being made a part of the immigration record herein.

The Board of Special Inquiry not being satisfied that the applicant was entitled to admission, voted that the "case be deferred and ten days allowed for the production of additional evidence" (Ex. A, p. 5), and the attorney of record was so advised in writing (Ex. A, p. 17).

Thereafter, to-wit, January 17, 1921 (Ex. A, p. 22), an additional affidavit of the alleged father (Ex. A, p. 20) and the affidavit of an additional witness, Lim Sing, were filed (Ex. A, p. 18).

Thereafter, to-wit, February 2, 1921, the alleged father (Ex. A, p. 32), and witness, Lim Sing (Ex. A, p. 30), testified before the Board of Special Inquiry and their testimony made a part of the record herein.

Lam Fook You, was denied admission by the Board of Special Inquiry (Ex. A, p. 28), and the Consul General for China (Ex. A, p. 33) and the attorney of record (Ex. A, p. 34) were advised of said denial, in writing.

From the excluding decision of said Board an appeal was taken to the Secretary of Labor, Washington, D. C. (Ex. A, p. 44), and the attorney of record was permitted to review the record and exhibits in the case as appears from his receipt therefor (Ex. A, p. 45).

Appellant was also represented by Attorneys Bouve and Parker, of Washington, D. C., before the Department of Labor (Ex. A, p. 48), who submitted the case on the record without brief or oral hearing (Ex. A, p. 52).

Thereafter, to-wit, April 27, 1921, the Assistant Secretary of Labor affirmed the excluding decision of the Board of Special Inquiry (Ex. A, pp. 53-56).

We have gone through the record several times very carefully and failed to discover a single instance where the appellant was denied any right or privilege to which he was entitled.

On the contrary it appears that he was accorded a full, fair and impartial hearing; that every jurisdictional step necessary to a fair hearing was taken; that applicant was permitted to and did present each and every witness he or his counsel desired to present and that all witnesses so presented were fully and fairly heard.

Counsel for petitioner failed to point out any unfairness in the record on the hearing in the Court below and he has also failed to point out any such unfairness in his brief before this Court.

Unless it appears from the record that the proceedings were *manifestly unfair*, or that the actions of the executive officers were such as to prevent a fair investigation, or that there has been a *manifest abuse* of the discretion committed to them by the

statute, the order of the executive officers within the authority of the statute is final.

Low Wah Suey v. Bacus, 225 U. S. 460-468.

ABUSE OF DISCRETION.

Does the record disclose a manifest abuse of discretion?

It appears from the record that the denial of the Board of Special Inquiry was based on the fact that in their opinion and judgment the applicant had failed to establish his right to enter the United States as the son of Lam Kin Fon.

This conclusion was based ~~upon~~ discrepancies and contradictions in the testimony of the various witnesses concerning matters in relation to which the testimony of the witnesses should agree, if the relationship claimed actually exists.

There are numerous discrepancies and contradictions appearing in the record of the testimony in this and other hearings which effect the credibility of the witnesses and may well have caused the Board and the Secretary of Labor to doubt their truthfulness.

As an aid to the Court, the more important of these discrepancies are pointed out.

DISCREPANCIES.

First—As to the time of the death of applicant's mother and whether or not her feet were bound or natural.

Lam Kin Tun, alleged father, testifies:

Q. How many times have you been married?

A. Twice.

Q. What is the name, age, kind of feet and whereabouts of your first wife?

A. Luey Shee, she died C. R. 7, first part of the 4th month (May, 1918) in my home in Kew Lee Village, Sun Ning District, China.

Q. How old was she at the time of her death?

A. Forty-one years old, *and had bound feet.* (Ex. A, p. 14).

(It appears from Exhibit B, p. 36, that the father went to China March 5, 1918, and returned to the United States September 10, 1919 (Ex. B, p. 37), and was therefore in China at the time of his wife's death.)

Lam Fook You testifies:

Q. What is your mother's name, age, kind of feet and whereabouts?

A. Luey Shee, she died 4 or 5 years ago in the Kew Lee Village.

Q. *Where was your father when she died?*

A. *He was in the United States.*

Q. Are you sure your father was in the United States when your mother died?

A. Yes.

Q. *What kind of feet did your mother have?*

A. *Natural feet.*

Q. *Were they ever bound?*

A. *No* (Ex. A, p. 8).

Here the applicant testifies that his father was in the United States at the time of his mother's death, while the record shows the father to have been in China.

The applicant testifies that his mother had *natural feet* and that they never were bound, while the alleged father testifies that she had *bound feet*.

Second—As to whether it is the second or third son which died and whereabouts of the other sons.

Lam Kin Tun testifies:

Q. How many children did you have by your first wife?

A. Five boys, no girls.

Q. Give their names, ages and whereabouts.

A. Lam Gim, about 26 years old, he is in *Singapore*; Lam Chee, 24 or 25, also in *Singapore*; Lam You, 23 years old, now, *he died in S. T. 2, in my home village in China*; Lam Fong, 22 years old, in *China*, and Lam Fook You 8 years old, applicant for admission.

Q. Are you sure that your third son, Lam You, is dead?

A. Yes (Ex. A, p. 13).

In 1919 he testified that Lam Chee was dead (Ex. H, p. 22).

Lam Fook You testifies:

Q. How many brothers and sisters have you?

A. Four brothers, no sisters.

Q. Give their names, ages and whereabouts.

A. Lam Gim, 25 years old, in the *United States*.

Q. Are you sure he is in the *United States*?

A. Yes.

Q. Next brother.

A. Lam You, 24 or 25, also in the *United States*; Lam Chee, 22 or 23 years old, *he is dead*; Lam Quon Fong, 21 or 22, he is farming at home.

Q. When did your brother, Lam Chee, die?

A. I don't know.

Q. Are you sure your brother, Lam Chee, is dead?

A. Yes (Ex. A, p. 8).

Here the alleged father testifies that his third son Lam You is dead, while the applicant testifies that it is the second son, Lam Chee, who is dead. The father also testifies that two of his sons are in

Singapore, while the applicant testifies that they are in the United States.

Third—As to where the paternal grandparents are buried,

The alleged father testifies:

Q. Where are your parents buried?

A. In the hill *back of my village*, the Long Chon Hill (Ex. A, p. 13).

Lam Fook You testifies:

Q. Do you know where your father's parents are buried?

A. In the Long Hill *in front of the village*.

Q. Has that hill any other name?

A. No.

Q. *Are you sure it is in front of the village?*

A. Yes (Ex. 8, p. 8).

Fourth—As to where the applicant and the identifying witness, Lam Fook Loy, met in China:

The witness Lam Fook Loy testifies:

Q. *Where did you meet the applicant to bring him to the United States?*

A. *At the railroad station in See Gew market.*

Q. Who came with the applicant to this station?

A. Quong Fong, his brother.

Q. Name all the persons who accompanied you and the applicant from See Gew market to Hong Kong.

Lam Fook You testifies:

Q. Who brought you to the United States?

A. Lam Fook Loy.

Q. *Where did you meet him?*

A. *My brother took me to Hong Kong and I met him at the Quon Loy Yuen store in Hong Kong.*

Q. Did Lam Fook You travel any part of the journey with you to Hong Kong from your home village?

A. Quon Fong and Fook You and my son Lim San, that is all. I want to explain that when Quon Fong brought the papers to my house, Fook You did not come with him (Ex. A, p. 9).

A. *No, I met him in Hong Kong.*

Q. Did you and your brother Fong go to Hong Kong alone?

A. Yes.

Q. And you did not see Lam Fook Loy until you met him at the Quon Loy Yuen store in Hong Kong?

A. *No, I did not see him until I met him at that store* (Ex. A, p. 6).

We have pointed out these various discrepancies in the record hoping that by so doing it may aid the Court in its review of the record. There are other discrepancies in the testimony, but it does not seem necessary to dwell upon them here.

These discrepancies and contradictions are in respect to facts of time, place and relationship concerning which the witnesses cannot be presumed to be mistaken and which appear to have been deliberately, knowingly and falsely made with intent to deceive. No reasonable or satisfactory explanation has been offered, although ample opportunity was afforded each witness to make such explanation, as it appears from the record that each was asked at the close of his examination if he had any further statements to make, to which each replied in the negative.

Because of the contradictions and discrepancies appearing in the evidence as set out in the immigr-

tion records, the Board of Special Inquiry and the Secretary of Labor were called upon to exercise a discretion in the determination of the question then before them.

In the exercise of this discretion they could have decided the case either in favor of, or against the appellant, and, whichever way they decided, there being some evidence in support of that decision, their reasons for so doing would not be subject to judicial review by the courts. Otherwise, their authority over such matters would be nullified. It would be substituting the discretion of the court for that of the immigration authorities, whose finding, if within the statute, is final.

In the recent case of *Jeung Bock Hong and Jeung Bock Ning v. White*, 258 Fed. 23, the Court, speaking through his Honor, Judge Morrow, said:

“The discrepancies in the testimony appear to be unimportant, but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner’s right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion.”

“We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the execu-

tive officers within the authority of the statute is final."

The same Court, speaking through his Honor, Judge Morrow, in *White v. Gregory*, 213 Fed. 768-770, says:

"In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. *It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers.*"

Again, in *Lee Ah Yin v. U. S.*, 116 Fed. 614, 615, the Circuit Court of Appeals, speaking through his Honor, Judge Gilbert, held that

"There were inconsistencies in the evidence which may well have caused the commissioner and the Court to doubt its truth, and there were circumstances which tended to impeach the evidence of the plaintiff in error. We cannot say that the judgment was clearly against the weight of the evidence."

In *Low Wah Suey v. Backus*, 225 U. S. 460 (56 L. Ed. 1167), the Court, speaking through Mr. Justice Day, says:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusively when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made

upon such hearings, it must be shown that the proceedings were *manifestly unfair*, that the *action of the executive officers was such as to prevent a fair investigation*, or that there was a *manifest abuse of the discretion committed to them by the statute*. In other cases the order of the executive officers within the authority of the statute is final. U. S. v. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040, 25 Sup. Ct. Rep. 644; Chin Yow v. U. S. 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201; Tang Tum v. Edsell, 223 U. S. 673."

We confidently urge and believe that the action of the Secretary of Labor in denying appellant the right to enter the United States and ordering his deportation is justified by the facts disclosed in the record, and to hold that such order and finding was a manifest abuse of the discretion committed to the Secretary by the statute would be to substitute the discretion of the Court for that of the Acting Secretary.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,
BEN F. GEIS,
Assistant United States Attorney,
Attorneys for Appellee.

United States
Circuit Court of Appeals
for the Ninth Circuit.

EWA PLANTATION COMPANY, a Hawaiian Corporation,
Plaintiff in Error,

vs.

CHARLES T. WILDER, as Tax Assessor for the First Taxation Division, Territory of Hawaii,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

FILED
JUL 8 - 1922
F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EWA PLANTATION COMPANY, a Hawaiian Corporation,

Plaintiff in Error,

vs.

CHARLES T. WILDER, as Tax Assessor for the First Taxation Division, Territory of Hawaii,
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Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ORIGINAL.

In the Supreme Court of the Territory of Hawaii.
October, 1920, Term.

No.—.

EWA PLANTATION COMPANY

vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of
Hawaii.

Statement of Agreed Facts.

SUBMISSION WITHOUT ACTION.

The undersigned, Ewa Plantation Company, a Hawaiian corporation, and Charles T. Wilder, as Tax Assessor for the First Taxation Division, Territory of Hawaii, being parties to questions of difference which might be the subject of a civil action in the Tax Appeal Court of said Territory, have agreed upon the following statement of facts upon which the controversy depends, viz:

(1) That on the 28th day of February, 1921, the said Ewa Plantation Company duly filed with the said Tax Assessor its income tax return for the year 1921, in manner and form required by law, a copy whereof marked Exhibit "A" is hereto attached and made a part hereof, whereby it appears that the said Company claims that its net income for the year amounted to \$3,913,638.03 upon which there would be payable income taxes amounting to \$156,545.52.

(2) That included in item (19) of Schedule "A" of said return is an item designated "Strike Claim Settlement \$2,324,931.75," which said Tax Assessor has increased to \$2,791,697.72. That the facts and circumstances relating to [1*] this point are as follows:

That on or about January 19th, 1920, the Filipino laborers of seven sugar plantations on the Island of Oahu, including Ewa Plantation, went out on strike and there followed on or about the 1st day of February, 1920, a strike of the Japanese laborers on the same plantation; that said laborers comprised almost the entire field and mill forces of said Company, and it became necessary in order to carry on the plantation to employ strike-breakers and other laborers at large expense. That on or about the 19th day of February, 1920, the Filipinos called off the strike so far as they were concerned, and the laborers of that nationality resumed their work; that the Japanese laborers continued their strike until July, 1920; that the basic wage schedule of the sugar plantations in the Territory of Hawaii is established through the recommendation of the Hawaiian Sugar Planters Association, an organization comprising practically every sugar plantation and mill company in the said Territory, including said Ewa Plantation Company, and individuals directly interested in the production of sugar; that said Japanese strikers and their families were maintained by the Japanese planta-

*Page-number appearing at foot of page of original certified Transcript of Record.

tion laborers on the islands of said Territory other than said Island of Oahu, and since all said plantation and mill companies were vitally affected by the outcome of the said strikes said companies decided that the strikes should be handled through and by said Association, and that the expense connected therewith should be borne *pro rata* by the several plantation members of said Association; that the demands of both the Filipino and the Japanese labor organizations, including a demand for an increase of wages, were presented to, and rejected by, the said Association; that it was also decided [2] by appropriate resolutions adopted both by the Hawaiian Sugar Planters Association and each plantation company member, to underwrite all losses incurred by plantations on which the strikes occurred by reason of their resistance of the strikes; that the losses underwritten were later definitely limited to those chargeable to the 1920, 1921 and 1922 crops, and to net losses to other property such as damage to buildings, etc., the amount to be determined by the decrease estimated in taxable net profits arising from or due to the disturbed labor conditions prevailing between January 19th, 1920, and September 30, 1920, inclusive. It was further decided by said Association and the members thereof that all claims should be settled in full, the sugar losses and settlement price of sugar being mutually agreed to by both the paying and the receiving plantations; that it was further agreed that the *pro rata* basis of settlement would be the average tonnage output of

each plantation-member of the Association for the years 1917-1918 and 1919; that the cost of the strikes to the Hawaiian Sugar Planters Association was as follows:

Strike expenses incurred by the As-

sociation	\$ 635,959.42
Plantation strike losses under-	
written	11,483,357.88
	<hr/>
	\$12,119,317.30

That each plantation-member of said Association, including said Ewa Plantation company, paid its *pro rata* of said \$12,119,317.30 on or before December 31st, 1920, and the plantations which suffered losses on account of said strike received \$11,483,357.88 on that date; that said Ewa Plantation Company received in full settlement of its said strike losses and its claim to reimbursement thereof the sum of \$2,791,697.72, this amount being made up of estimated losses in taxable profits; [3] For the crop of 1920 amounting to \$2,324,931.75; For the crop of 1921 amounting to 133,706.29; and For the crop of 1922 amounting to 333,059.68.

That the said Ewa Plantation Company paid as its *pro rata* share of the said gross loss the sum of \$721,818.95 and deducted that entire amount from its income for the year 1920, as shown by said Exhibit "A"; that all other plantations contributed their *pro rata* of said gross loss deducted the entire amount of such contributions or payments from their income tax returns for the 1920 income tax period; that the income tax return of

the said Ewa Plantation Company includes the sum of \$2,324,931.75 only as income for the year 1920.

Upon these facts it is the contention of the Company that the other two amounts, namely; \$133,706.29 and \$333,059.68 were received on account of losses of taxable profits of the crops of 1921 and 1922, respectively, and should be returned as income for those respective years and are therefor not to be included in its 1920 return.

And upon the same facts it is the contention of the said assessor that since the money was actually received during the 1920 taxation period, whether it be regarded as an advance realization of the 1921 and 1922 crops or otherwise, it should be returned as income accruing during the 1920 taxation period.

(3) That the said contention of said company is based upon the facts that prior to the year 1906 the taxable income of the Company was annually determined by ascertaining the difference between the gross income and the disbursements for operating and other expenses during the year, but since the ruling made by this court in the case of Tax Assessor vs. Laupahoehoe Sugar Company, 18 Haw. 206, the sugar plantation companies, including said Ewa Plantation Company, consistently have computed [4] their taxable income on what has been termed the crop basis rather than an annual basis, that is to say; instead of deducting the said disbursements from the said gross income the said Company has deducted the amounts expended or to be expended in the production and marketing of the crop harvested during the taxation period, from the

proceeds of sales; and that similarly gross income has been returned on the basis of the current crop and not on receipts from sales during the taxation period, and that by this system the receipts from the sale of the sugar of the crop of the taxation period are returned as the income of the taxation period whether such sugar were actually sold within the preceding year or not. That the said "strike losses" received by said Company for the crops of 1921 and 1922 were the estimated net losses in taxable profits on those crops due to the strikes; that net losses in taxable profits were ascertained by taking into account the estimated value of sugar lost through improper or insufficient cultivation due to the strikes, the estimated additional amount which would have been required in the production and marketing of said sugar, and the estimated increase or decrease in all other expenditures on said crops due to the strikes.

In case the contention of said assessor should be sustained on this point, the amount of income taxes payable by the said Company should be increased by the sum of \$18,670.60 over the amount shown by the Company's said return.

(4) That said assessor has disallowed a certain deduction claimed in Schedule "B" of said return, namely, item "(2) Interest on Mainland and Foreign Investments," the sum of \$52,442.23, being the aggregate sum received by said Company as interest upon the bonds and notes of foreign (mainland) railroad and industrial corporations,

and interest upon deposits in mainland [5] banks, a schedule whereof marked Exhibit "B" is hereto attached and made part hereof; that the facts in this connection are that ever since the incorporation of said Ewa Plantation Company, Castle & Cooke, Limited, a Hawaiian corporation, has been the general agent at Honolulu of said Ewa Plantation Company, and during upwards of twenty years last past Welch & Company, a California corporation having offices in California and New York, has been the agent at San Francisco of said Castle & Cooke, Limited; that at all times during said period the sugar produced by said Ewa Plantation Company has been sold on the Mainland of the United States and the proceeds of sale have been received by said Welch & Company, deposited in California banks, and credited on its books to Castle & Cooke, Limited, for account of said Ewa Plantation Company against which said credit said Ewa Plantation Company has drawn from time to time as needed moneys required by it for the payment of the expenses of its plantation and dividends upon its stock; that all said bonds and notes were purchased by said Welch & Company for the account of said Ewa Plantation Company with surplus moneys of the latter so held as aforesaid by the former company, and the said bonds and notes thereafter, until they were sold on the Mainland, remained on deposit with said Welch & Company and none of said bonds and notes, or the proceeds with which they were purchased, have been held in said Territory, nor have they been

physically present therein at any time; that at no time heretofore has the said assessor, or his predecessors in office, considered income derived from such investments as taxable income, or included such in assessing the incomes of corporations or individuals under the laws of said Territory. [6]

Upon these facts it is the contention of said Company that the interest accruing from said bonds, notes and bank deposits was not taxable as income derived from property owned, or business carried on in said Territory, or otherwise under the laws of said Territory.

Upon the same facts it is the contention of said assessor that said interest upon said bonds, notes and bank deposits was and is taxable income of said Company.

In case the contention of said assessor on this point should be sustained, the amount of income taxes payable by said Company would be increased by the sum of \$2,097.68 over the amount shown by the Company's said return.

(5) That said Assessor has disallowed a certain deduction claimed in Schedule "B" of said return, namely, item "15-(c) Loss on Sale Sugar Factors Stock" in the sum of \$289,680.00. The facts with regard to the purchase, ownership and sale of this stock are as follows:

Said Sugar Factors Company, Limited, owned 87% of the capital stock of the California and Hawaiian Sugar Refining Company, a California corporation, which during recent years had purchased and refined a large proportion of the

Hawaiian raw sugar. The stock of said Sugar Factors Company was offered to and purchased by plantations and persons engaged in the sugar industry in Hawaii at its par value of \$100.00 per share; and the ownership of said stock by said plantations and persons entitled them to sell a certain proportion of their sugar to said Refining Company, and they so sold to the same all of the sugar produced by them during the year 1920. Ewa Plantation Company purchased 4,828 shares of the stock of said Sugar Factors Company at its par value during the years 1904–1917, and said stock [7] owing to accumulated surplus earnings of the said Refining Company, had, on the basis of book values, an estimated value of over \$240.00 per share at the end of the year 1919, but said stock has never been offered for sale in the open market and has never had any open or stock market quotation value.

Up to the middle of the year 1920 said Refining Company had apparently earned a considerable profit from its business of the earlier months of that year, but shortly thereafter a break occurred in the sugar market which resulted in the inability of said Refining Company to sell its sugar, while at the same time it had on hand large supplies of high cost sugars including foreign purchases, and was under contractual obligations to continue to purchase sugar from the Hawaiian planters. In consequence, by the 1st of December, 1920, it became apparent that said Refining Company would suffer a loss of approximately \$13,000,000.00,

which would wipe out not only its accumulated surplus but also part of its capital, and place it in a precarious financial condition.

In order that said Refining Company might continue in business it became necessary for its stockholders to arrange for additional capital and as its principal stockholder was said Sugar Factors Company, which was substantially a holding company, the principal asset of which was its stock in said Refining Company, the burden of arranging for said additional capital fell upon the stockholders of said Sugar Factors Company.

In order to effect such arrangements, said Sugar Factors Company, as a preliminary step, purchased the remainder of the stock of said Refining Company and thereby obtained complete control of said Refining Company, and it was then decided that either additional capital should be provided for said Refining [8] Company or that a new corporation should be organized to take over the assets and liabilities of said Refining Company. In order to assist the stockholders of said Sugar Factors Company to carry out either of these plans and to meet the heavy financial obligations devolving upon said stockholders, their agents offered to buy their stock in said Sugar Factors Company at its appraised value, which was found to be \$40.00 per share, and practically all of said stockholders, including Ewa Plantation Company, accepted such offers, and Ewa Plantation Company thereupon in December, 1920, sold its said stock in said Sugar Factors Company to its agent at said appraised value of

\$40.00 per share and thereby sustained a loss in said amount of \$289,680.00, that sum being the difference between the purchase price of said stock at par and the sale price thereof at \$40.00 per share, said loss being due to the fall in the value of the stock of said Sugar Factors Company, Limited, by reason of the fall in the value of its principal asset its stock in said Refining Company by reason of said losses of the latter company in the latter part of the year 1920.

Early in the year, 1921, a new corporation named the California and Hawaiian Sugar Refining Corporation was incorporated under the laws of the State of California with a much larger capital than that of said California and Hawaiian Sugar Refining Company, and the latter company thereupon sold to new corporation all of its assets, subject to its liabilities, in consideration of the issuance to it by said new corporation of all of the latter's preferred stock of the par value of \$2,500,000.00, and all of the common stock of said new corporation of the par value of \$10,000,000.00 was offered at par to plantations and persons engaged in the sugar business in Hawaii in substantially [9] the proportion that the sugar produced by them respectively bore to the total sugar produced by all of them and was purchased by them at the par value thereof.

Upon these facts the Ewa Plantation Company contends that said loss is properly deductible in computing its net income for the 1920 taxation

period and the Assessor contends that it is not a deductible loss.

If the contention of the Assessor should be sustained the amount of income taxes payable by the Ewa Plantation Company would be increased by the sum of \$11,587.20 over the amount shown by the company's said return.

(6) That said assessor has disallowed a certain deductible claim in Schedule "B" of the tax return, namely, item "15-(d) Loss on Sale, Miscellaneous Bonds," in the sum of \$197,824.11. The facts in this regard are as follows:

That the said miscellaneous bonds were purchased at the times and prices set forth in Exhibit "C" hereto attached and made a part hereof; that the market and sale value of said bonds fluctuated from time to time during the period that the same were held by said Ewa Plantation Company; that the said bonds were sold in 1920 at their then full market value and at a price which was \$197,824.11 less than their original cost; and \$69,512.98 less than the market value of said bonds on December 31, 1919; that the said bonds were sold because the Company deemed it advisable to sell them in order to prevent possible greater loss; and that the prices received for said bonds represented the full market value thereof at the time they were sold.

Upon these facts the company contends that the said amount of \$197,824.11 is a loss within the meaning of the income tax statute and is properly deductible in computing the net income of

said Company, and upon the same facts the tax assessor [10] contends that that amount is not so deductible, either in whole or in part.

If the contention of the tax assessor should be sustained, the amount of income taxes payable by said Company would be increased by the sum of \$7,912.96 over the amount shown by the Company's said return.

(7) That judgment may be entered herein by the Court assessing the amount payable as income taxes by said Company in accordance with the views of the Court upon the facts herein agreed upon.

Honolulu, Hawaii, April 29, A. D. 1921.

EWA PLANTATION COMPANY.

By (Sig.) ROBERTSON, CASTLE & OLSON,

Its Attorneys,
CHARLES T. WILDER,

Tax Assessor,
By (Sig.) HARRY IRWIN,

Attorney General.

FREAR, PROSSER, ANDERSON & MARX,
SMITH, WARREN & STANLEY,
HENRY HOLMES,

Of Counsel.

First Judicial Circuit,
City and County of Honolulu,
Territory of Hawaii,—ss.

Harry Irwin, being first duly sworn, deposes and says that he is the duly appointed, acting and qualified Attorney General of the Territory of Ha-

waii, and that he makes this affidavit for and on behalf of Charles T. Wilder, Tax Assessor, one of the parties to the foregoing submission; that he has read the foregoing Submission of Facts, knows the contents thereof; and that the same is true to the best of his knowledge and belief. This deponent further says that the controversy set forth in the said Submission is a real one and that this proceeding was instituted in good faith to determine the rights of the parties.

[Seal] (Sig.) THERESA CLARK,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [11]

Exhibit "A."**EWA PLANTATION.****Form C**

Territory of Hawaii
DISTRICT OF HONOLULU
First Taxation Division
CORPORATION INCOME TAX RETURN
1921

Statement of Gains, Profits and Income during the
Twelve Months Preceding January 1, 1921, of

Name

CASTLE & COOKE, LTD.

Agent for

EWA PLANTATION

Agent's Address, Street and Number

Agent's Business Telephone No. —————

SUMMARY
INCOME TAX

	[Use this column]	[Use this column]
Gross Income	\$12,901,542.22	\$.....
Deductions	\$ 8,987,904.19	\$.....
Net Income	\$ 3,913,638.03	\$.....
Tax 2 per cent	\$ 78,272.76	\$.....

SPECIAL INCOME TAX

Gross Income	\$	\$
Deductions	\$	\$
Net Income	\$	\$
Tax 2 per cent	\$ 78,272.76	\$
[12]		

SCHEDULE "A"—GROSS INCOME.

HOW DERIVED.

(1) INTEREST ON BONDS (GENERAL).....	\$ 62	530	16
(2) INTEREST ON GOVERNMENT BONDS, U. S. BONDS TREASURY CERTIFICATES.....	43	730	18
(3) INTEREST (GENERAL)	52	442	23
(4) INTEREST ON MAINLAND AND FOREIGN INVESTMENTS			
(5) DIVIDENDS FROM CORPORATION STOCKS.....			
(6) SALES OF REAL ESTATE, INCLUDING LEASEHOOLDS, PURCHASED WITHIN TWO YEARS.....			
(7) SALES OF STOCKS AND BONDS PURCHASED DURING THE YEAR 1920.....			
(8) SALES OF MOVABLE PROPERTY: (a) MERCANDISE.....			
(b) SUGAR			
(c) SUGAR			
(d) MOLASSES			
(e) LIVESTOCK			
(f) HIDES			
(g) BEEF			

	Thousand Hundred Cents
(f) FARM TRUCK.....(i) ICE.....	(1) MILK.....
(g) ELECTRICITY.....\$363.11..(j) WATER.....\$439.74.....(m) SEED CANE.....	\$802 85
(9) PETTY REALIZATIONS:	
(a) PASTURAGE.....(b) FINES.....(c) UNCLAIMED WAGES.....	1 024 04
(10) UNDERESTIMATE OF SUGARS UNACCOUNTED FOR DEC. 31st, 1919.....	
(11) UNDERESTIMATE OF MOLASSES UNACCOUNTED FOR DEC. 31st, 1919.....	
(12) RANCH PROFITS.....	
(13) GROSS RENTALS FROM WITHIN THE TERRITORY.....	
(14) COMPENSATION FORM INSURANCE.....	116 236 53
(15) AMOUNT DEDUCTED FROM 1920 RETURN TO COVER FEDERAL TAX PAYABLE IN 1920.....	857 172 00
(16) DONATIONS CHARGED TO EXPENSE ACCT., NOT DEDUCTIBLE FROM INCOME.....	8 414 75
(17) AMOUNTS PAID OR PAYABLE, DISTRIBUTED OR DISTRIBUTABLE TO SHAREHOLDERS FROM ANY FUND OR ACCOUNT.....	
(18) AMOUNTS CARRIED TO THE ACCOUNT OF ANY FUND OR USED FOR CONSTRUCTION OR ENLARGEMENT OF PLANT, AND OTHER EXPENDITURES OR INVESTMENTS PAID FROM NET ANNUAL PROFITS.....	
(19) ALL OTHER INCOME RECEIVED FROM ANY SOURCE AS Co. Grinding Contract.....Strike Claim Settlement.....	2 373 38 2324 931 75
	<u>TOTAL.....</u>
	\$12901 542 22

[15]

SCHEDULE "B"—DEDUCTIONS AND EXEMPTIONS.

	Thousands	Hundreds	Cents
(1) INTEREST ON GOVERNMENT BONDS.....	\$ 62	530	16
(2) INTEREST ON MAINLAND AND FOREIGN INVESTMENTS	52	442	23
(3) INTEREST ON EXISTING INDEBTEDNESS ACTUALLY PAID DURING THE YEAR 1920	1	778	83
(4) DIVIDENDS FROM CORPORATION STOCKS, WHICH YOU RETURN UNDER ITEM 5 IN SCHEDULE "A".....	.....	.....	.....
(5) COST OF CROP (INCLUDING PROPERTY TAXES PAID)	3767	310	22
(6) MARKETING EXPENSES (UNLESS INCLUDED IN ITEM 5).....	691	415	94
(7) AGENCY AND OTHER EXPENSES (UNLESS INCLUDED IN ITEM 5).....	.....	.....	.....
(8) OVERESTIMATE OF SUGAR UNACCOUNTED FOR DEC. 31st, 1919.....	.....	.....	.....
(9) OVERESTIMATE OF MOLASSES UNACCOUNTED FOR Dec. 31st, 1919.....	.....	.....	.....
(10) COST OF REAL ESTATE, INCLUDING LEASEHOLDS PURCHASED SINCE 1918 AND MENTIONED AS SOLD, IN SCHEDULE "A".....	.....	.....	.....
(11) COST OF STOCKS AND BONDS PURCHASED DURING THE YEAR 1920 AND MENTIONED AS SOLD IN SCHEDULE "B".....	.....	.....	.....
(12) COST OF MERCHANDISE MENTIONED AS SOLD, IN SCHEDULE "A",	\$ 334	731	82

		Thousands Hundreds Cents
(13)	NECESSARY EXPENSES ACTUALLY INCURRED IN CARRYING ON BUSINESS OR IN MANAG- ING PROPERTY ITEMIZE ON NEXT PAGE.....	
(14)	LOSSES ARISING FROM FIRE.....	
(15)	LOSSES—(a) BAD DEBTS..... (b) STRIKE LOSS..... (c) LOSS ON SALE SUGAR FACTORS STOCK..... (d) LOSS ON SALE MISCELLANEOUS BONDS..... (e) BY EARTHQUAKE.....	4 491 93 721 818 95 289 680 00 197 824 11
(16)	TAXES AND LICENSES NOT INCLUDED IN ITEM NO. 5 OF THIS SCHEDULE..... (a) PROPERTY INCOME TAX (TERR.)..... (b) LICENSES SPEC. INCOME TAX..... INCOME TAX (FEDERAL)..... EXCESS PROFITS TAX (FEDERAL)..... CAP. STOCK TAX (FEDERAL)..... AMOUNT SET ASIDE FOR INSURANCE RESERVE..... ESTIMATED FEDERAL TAXES, PAYABLE IN 1921..... TOTAL.....	33 680 40 33 680 40 185 579 88 645 590 32 8 475 00 7 500 00 1949 374 00 \$8987 904 19

EX-EXPENSE ITEMS MAKING UP AMOUNT UNDER NO. 13 IN SCHEDULE "B"

(Business Expenses only) Do not include Household or Personal Expenses.

LABOR	\$
RENT	\$
INSURANCE	\$
REPAIRS	\$
WATER AND LIGHTS	\$
POWER	\$
AUTO EXPENSE	\$
SUNDRIES	\$

NOTE.—The cost of scientific books and instruments is not deductible as an expense, except in case of replacement.

TERREITORY OF HAWAII

Section 1309 of the Revised Laws of Hawaii, provides that "Every Corporation doing business for profit in the Territory shall make and render to the Assessor of its tax division, between the first and the thirty-first days of January, in each year, a full return verified by oath or affirmation of its duly empowered officer in such form as the Treasurer of the Territory may prescribe, of all the following matters for the taxation period ending December 31st next preceding the date of such return:

- First: The gross receipts of such Corporation from sales made at home or abroad and from all kinds of business, of any name or nature;
- Second: The expenses of such Corporation exclusive of interest, annuities and dividends;
- Third: The amount paid on account of interest, annuities and dividends stated separately;
- Fourth: The amount expended on permanent improvements;
- Fifth: The amount paid in salaries or compensation of more than six hundred dollars to each person employed during each taxation period,* and the name and amount paid to each."

*The taxation period here referred to is the period beginning January 1st, 1920, and ending December 31st, 1920.

Territory of Hawaii,
City and County of Honolulu,—ss.

The undersigned being duly sworn deposes and says: That he is —— of the ——; that he has read the foregoing return by him subscribed for and on behalf of said —— and knows the contents thereof; that the same is a true, full and complete return, and that the facts herein set forth are true to the best of his knowledge and belief.

Sworn to before me this —— day of January,
A. D. 1921.

(Sign your name here before filing.)

(Deputy Assessor. [19])

BWA PLANTATION COMPANY

EXHIBIT "B"

INCOME FROM INVESTED INVESTMENTS.

	Par Value	Rate of Interest	Interest Year 1922
<u>MAINLAND RAILROAD BONDS</u>			
Atlantic Coast Line	\$1,000.	4%	747.08
Baltimore & Ohio	30,000.	4	1,296.77
" " S.W.	17,000.	3-1/2	543.66
" " P.L.E. & A.Va.	7,000.	4	254.56
Chicago, Burlington & Quincy Jr.	10,000.	4	333.11
" " Gen'l.	25,000.	4	911.11
Chicago & N.W.	10,000.	3-1/2	744.57
Chicago, M. & St. Paul Gen'l.	24,000.	4	938.66
Central Pacific Ref.	25,000.	4	875.01
Illinois Central Ref.	23,000.	4	850.34
Lake Shore & Mich. S.R.	23,000.	4	812.44
Louisville & Nashville Unified	25,000.	4	875.75
Northern Pacific P.L.	37,000.	4	1,307.33
Oregon Short Line	25,000.	4	837.54
Reading	31,000.	4	1,157.33
Southern Pacific Ref.	22,000.	4	789.56
Union Pacific Ref.	29,000.	4	1,040.79
West Shore	30,000.	4	1,120.00
Chicago & N.W. Gen'l.	12,000.	4	448.00
Chicago Union Station	21,000.	4-1/2	868.90
Delaware & Hudson	25,000.	4	930.56
Great Northern Ry.	1,000.	4-1/4	39.67
Kansas City Terminal	24,000.	4	895.44
New York Central	22,000.	3-1/2	703.70
Union Pacific 1st L.G.	12,000.	4	448.00
Penn. R.R. Cons.	20,000.	4-1/2	777.50
" " Gen'l.	25,000.	4-1/2	964.38
Atchison Gen'l.	27,000.	4	951.00
<u>MAINLAND INDUSTRIAL BONDS</u>			
Cal. Gas & Elec. Unifield	25,000.	5	1,089.87
Amer. Tel. & Tel. Co.	22,000.	4	823.77
Armour & Co. Real Estate	27,000.	4-1/2	1,090.12
Spring Valley Water	25,000.	4	1,000.00
<u>MISCELLANEOUS INCOME</u>			
Cal. & Hawaiian Sugar Refining Co. Notes		7	16,940.25
Bank Deposits			
Canadian Bank of Commerce		4-3/4	4,385.43
Wells Fargo Nevada National Bank		5	5,123.29
Total			\$52,442.28



EWA PLANTATION COMPANY

EXHIBIT "C"

LOSS ON SALE OF SECURITIES

Sec Value	Date of Purchase	Cost	Market Price Dec. 31, 19	Market Value Jan. 31, 19	Depreciation during year 1920	Amount Realized	Actual Loss
<u>MAINLAND RAILROADS:</u>							
Atlantic Coast Line	1911-1912	19,020.00	79.675	16,773.75	447.75	16,354.00	3,504.00
Baltimore & Ohio	1911-1912	26,715.00	65.80	20,680.00	795.00	20,068.00	5,566.00
" " " " "	1911-1912	16,331.25	77.00	13,090.00	135.50	13,064.50	2,375.75
" " " " " & P. Co.	1911-1912	6,295.75	58.00	4,060.00	249.50	4,329.50	1,969.25
Chicago, Burlington & Quincy Inc.	1911	9,625.75	95.00	9,500.00	110.00	9,610.00	12.75
Chicago, Burlington & Quincy Inc. Gen'l.	1911-1912	23,485.75	79.50	19,875.00	236.25	19,612.75	4,062.00
Chicago & N.W.	1911	5,600.50	68.125	5,112.00	277.50	5,358.00	2,047.50
Columbus, M. & St. Rail. Gen.	1911-1912	22,565.00	71.00	17,040.00	996.00	16,044.00	5,821.00
Central Pacific Ref.	1911-1912	28,420.00	76.75	19,187.50	1,266.25	17,951.75	5,486.75
Illinois Central Ref.	1911-1912	21,407.50	76.00	17,895.00	476.00	17,125.00	5,864.50
Lake Shore & Michigan Ref.	1911-1912	21,577.50	83.875	19,261.25	580.75	18,710.50	2,867.00
Louisville & Nashville Unified	1911-1912	24,296.25	84.50	21,226.00	837.50	20,281.00	4,008.75
Northern Pacific R.R.	1911-1912	36,972.50	79.50	29,415.00	1,166.50	28,849.50	7,723.00
Oregon Short Line	1911-1912	23,311.25	64.75	21,062.00	1,850.00	19,212.50	4,028.75
Reading	1910-1914	30,082.50	81.00	28,110.00	65.75	28,179.75	4,882.75
Southern Pacific Ref.	1911-1912	20,695.25	78.50	17,270.00	827.00	18,412.00	4,284.25
Union Pacific Ref.	1911-1912	27,216.75	80.125	23,286.25	1,890.45	21,286.50	5,860.45
West Santa Fe	1911-1912	29,793.75	78.50	22,080.00	1,542.50	21,267.50	5,826.25
Citrus & W.W. General	1916	11,345.00	79.50	10,460.00	945.00	9,117.00	2,350.00
Calgary Union Station	1912	21,000.00	81.025	17,141.75	582.75	16,488.50	4,441.50
Pelham & Indiana	1911-1912	24,603.75	81.	20,250.00	976.00	19,278.00	5,328.75
Great Northern Railway	1916	586.75	85.50	325.00	44.50	788.50	200.25
Kansas City Terminal	1916	21,048.75	76.00	18,240.00	1,427.25	16,812.75	4,234.00
New York Central	1916	18,095.00	68.825	15,097.50	60.50	15,037.00	3,066.00
Union Pacific 1st L.G.	1916	11,715.75	80.125	9,615.00	2.00	9,612.00	2,106.75
Delta & C. Co.	1916	21,175.00	82.00	18,400.00	480.00	17,490.00	3,226.00
Delta & C. Co. Gen'l.	1916	28,784.50	84.50	21,185.00	757.50	20,387.50	6,396.00
Atchison Gen'l	1911-1912	26,252.50	85.	22,140.00	1,040.50	20,479.50	5,753.00
603,000.00		574,290.63		478,667.50	19,227.75	456,429.50	117,860.00
<u>Marine Insurance:</u>							
Calif. Gas & Elec. Unified		25,000.	1916	24,895.00	90.25	22,562.50	1,332.75
Amer. Tel. & Tel. Co.		22,000.	1916	20,380.00	78.50	17,270.00	1,607.00
American Cr. & Co. State		27,000.	1916	28,110.00	83.50	22,945.00	20,277.00
74,000.00		70,335.00		62,377.50	4,959.75	57,447.75	12,587.25
<u>U.S. GOVERNMENT OBLIGATIONS:</u>							
First " Liberty " can Bonds	1917-1919	186,130.00	100.00	186,372.00	17,856.50	168,615.47	17,614.50
Second " " "	1917	112,500.00	92.70	113,557.50	9,166.50	104,391.12	18,108.50
Third " " "	1918	101,000.00	94.50	94,800.00	6,902.50	87,897.50	16,102.50
Fourth " " "	1918	102,000.00	93.50	93,300.00	7,300.50	85,477.50	14,537.50
Fifth " " " (Victory)	1919	105,000.00	99.00	104,370.00	4,097.50	100,274.50	9,727.50
613,500.00		613,620.00		591,929.50	48,345.50	546,565.37	57,076.00
<u>INC. BT C. S.</u>							
Star Factors Co. Stock	1916-1917	482,500	482,500.00			482,500.00	229,680.00
GRAND TOTALS		1,378,300	1,373,065.63			1,263,551.52	487,504.11

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. October, 1920, Term. No. —. Ewa Plantation Company vs. Charles T. Wilder. Submission Without Action. Rec'd and Filed in the Supreme Court April 29, 1921, at 3:55 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [22]

In the Supreme Court of the Territory of Hawaii.
October Term, 1921.

No. 1327.

EWA PLANTATION COMPANY
vs.

CHARLES T. WILDER, Tax Assessor for the First
Taxation Division, Territory of Hawaii.

No. 1328.

HAWAIIAN SUGAR COMPANY
vs.

CHARLES T. WILDER, Tax Assessor for the First
Taxation Division, Territory of Hawaii.

Opinion of Supreme Court.**SUBMISSION UPON AGREED STATEMENTS
OF FACT.**

Argued January 24, 25, 1922.

Decided February 28, 1922.

COKE, C. J., KEMP and EDINGS, JJ.

Taxation—Income.

Where a sum is received by the taxpayers in liquidation of losses or damage sustained because of a laborers' strike income tax thereon should be paid for the year in which the payment is made.

Same—Same.

Bonds and stock of mainland municipalities and corporations and bank credits in mainland banks held by mainland agents of a local taxpayer take the situs of the local owner under the maxim *mobilia sequuntur personam* and come within the description of property owned in Hawaii and the income therefrom is taxable under the laws of this Territory. [23]

Same—Same.

The maxim, however, is not of universal application and may yield to the exigencies of particular circumstances.

Same—Same—Losses sustained on the sale of securities—Incurred when.

Where a taxpayer through the sale of securities sustains a loss because of the depreciation in the value of the securities the amount of such loss may be deducted from the income for the year in which the securities were disposed of.

Same—Depreciation or exhaustion of leasehold—
Deduction from income.

In computing income a proper deduction may be made for actual loss incurred during the taxation period due to exhaustion of all intangible property arising out of its use and employment in the trade or business of the taxpayer including any loss by reason of the exhaustion of a leasehold by efflux of time if such leasehold was actually employed in the business.

Same—Same—Same.

The proper course is for the leasehold to be appraised at the end of each taxation period, and based upon that valuation to deduct a proper amount for the exhaustion of the leasehold occurring during the period, this course to be repeated thereafter at the end of each succeeding taxation period until the termination of the lease.

Same—Same—Same.

The value of a leasehold due to economic causes will vary and it follows that the amount required to amortize the capital investment will also change from time to time. [24]

OPINION OF THE COURT BY COKE, C. J.

These two causes are here on original submissions containing agreed statements of fact—a proceeding authorized by section 2381, R. L. 1915, as amended by Act 82 S. L. 1921. The questions involved in both cases are in all material respects parallel and will therefore be consolidated and discussed in a single opinion but a separate judgment will be entered in

each proceeding conformably to the decision. The two plaintiffs above named, to wit, Ewa Plantation Company and Hawaiian Sugar Company, are domestic corporations and the defendant Charles T. Wilder is the tax assessor for the first taxation division of the Territory of Hawaii. The controversy is in respect to the amount of income taxes due from the two plaintiff corporations to the Territory of Hawaii in the year 1921 from income received in 1920.

The agreed statements of fact are entirely too voluminous to be recited here but the questions at issue may be summarized as follows: (1) Whether the amount received by Ewa Plantation Company from the Hawaiian Sugar Planters Association in 1920 by way of compensation for losses incurred by reason of the laborers' strike on the Island of Oahu should be accounted for as a whole as a receipt during the year 1920, or may be apportioned to the crops of 1920, 1921 and 1922 in accordance with the prevailing system of accounting upon the crop method; (2) whether interest upon mainland investments, including municipal bonds, accruing during the taxation period is taxable income under the law of this Territory as applied to the agreed facts; (3) whether the amount of loss sustained through the sale of shares in the Sugar Factors Company during 1920 is deductible as a loss in computing the income taxes of the said companies for the year [25] 1920 under the facts set forth in the submissions; (4) whether the amount of loss sustained through the sale of mainland bonds sold and realized upon

during the year 1920 is deductible as a loss in computing the income taxes of the said companies for the year 1921 under the facts set forth in the submissions; (5) whether the amount of depreciation in value of a leasehold should be allowed as a deduction in computing the income tax of the Hawaiian Sugar Company for the year 1920 under the law of this Territory as applied to the agreed facts.

As thus categorically classified the several subjects will be taken up and disposed of except that the questions set forth in paragraphs 3 and 4 being closely allied and so nearly analogous will be considered and determined together.

STRIKE RECEIPTS.

The first question concerns solely the Ewa Plantation Company and grows out of a laborers' strike begun in the early part of 1920 and which ended in July of the same year, conducted by the Filipino and Japanese laborers employed on the sugar plantations on the Island of Oahu, the Ewa Plantation being among those affected. It appears that the Hawaiian Sugar Planters Association, which is composed of practically all of the sugar producing concerns in the Territory, entered into an agreement with the plantations on Oahu by which the latter plantations were to resist the demands of the strikers and at the conclusion of the strike the association was to make reimbursement to them for all losses sustained by reason of the strike. Following the conclusion of the strike it was ascertained that the strike losses amounted to \$12,119,317.30 made up of

\$635,959.42 in expenses incurred by the association and \$11,483,357.88 in losses sustained directly by the several plantations on Oahu affected by the strike. [26] All of the plantation members of the association paid their *pro rata* of the \$12,119,317.30 on or before December 31, 1920, the *pro rata* of the Ewa Plantation being the sum of \$721,818.95. The said Ewa Plantation received in full settlement of its strike losses on its claim for reimbursement thereof the sum of \$2,791,697.72, this amount being made up of estimated losses in taxable profits as follows: For the crop of 1920, \$2,324,931.75; for the crop of 1921, \$133,706.29, and for the crop of 1922, \$333,059.68. The Ewa Plantation in its income tax return for the year 1920 deducted the said sum of \$721,818.95 contributed by it as its *pro rata* of the gross losses as aforesaid and returned the said sum of \$2,324,931.75 only as income for the year 1920 on the amount which it received from the association as its share of the loss sustained. Under these facts it is the contention of the company that the other two amounts, namely, \$133,706.29 and \$333,059.68 were received on account of losses of taxable profits on the crops of 1921 and 1922 respectively and should be returned as income for those respective years and therefore were properly excluded from its 1920 return. It is the contention of the tax assessor that since the two last mentioned sums were actually received during the 1920 taxation period, whether they be regarded as advance realizations of the 1921 and 1922 crops or

otherwise, they should be returned as income accruing during the 1920 taxation period.

It is agreed that should the contention of the assessor be sustained on this point the amount of income taxes payable by said company should be increased by the sum of \$18,607 over the amount shown by the company's said return. The statutory provisions bearing upon the questions at issue are to be found in section 1305 R. L. 1915 which provides that the taxation period shall be the year immediately preceding the first day of January of each [27] year in which the tax is payable. Section 1306 R. L. 1915 provides that there shall be levied and collected a tax of two per cent on the net profit or income above actual operating and business expenses derived during the taxation period from all property owned and every business, trade, employment or vocation carried on in the Territory of Hawaii, and section 1307 provides that "in estimating the gains, profits and income of any * * * corporation, there shall be included all income derived from interest upon notes," etc., "and all other gains, profits and income derived from any source whatsoever during said taxation period." Section 1307 also provides that "in estimating the gains, profits and income of any person or corporation, there shall be included * * * the amount of sales of movable property, less the amount expended in the purchase or production of the same."

The company contends that under the paragraph last above quoted the several sums received

from the Hawaiian Sugar Planters Association should not be taken into account for taxation purposes until and as each crop shall have been sold and the net result ascertained. The company relies upon the decisions rendered in *Tax Assessor vs. Laupahoehoe Sugar Company*, 18 Haw. 206, and in the *Income Tax Appeal Cases*, 18 Haw. 596, 599. In each of these cases it was held that moneys expended prior to the taxation period in the production of sugar were deductible, not in the period in which the expenditure was made but at the time the crop was sold. These decisions we think are in accord with the provisions of the statute. In the present case, however, we are confronted with a different set of facts. It must be borne in mind that we are now dealing with a receipt and not an expenditure. The amount paid was merely in liquidation of an estimated loss or damage sustained by the company because of the strike. Whether this estimate proves to be even approximately [28] correct will necessarily depend upon many contingencies, but irrespective of that feature it is plain to us that the company has not the power merely by an arrangement with the Hawaiian Sugar Planters Association, or for the sake of harmony in its accounting system or otherwise, to convert a sum received by it as compensation for damages caused by the laborers' strike into an amount expended in the purchase or production of specific growing crops of sugar cane. No such feat is sanctioned by the statutes of Hawaii heretofore quoted nor by the decisions in 18 Haw., *supra*,

which point out that the amount expended in the purchase or production of movable property should be carried over from year to year and deducted at the period when the property is sold, which merely follows the mandate of the statute, but neither the sum involved here nor any part thereof was expended in the purchase or production of movable property and hence the whole amount thereof is included within "other * * * income * * * derived from any source whatsoever during said taxation period." And as the payment was made during the year 1920 the income tax thereon became due in the following year as provided by statute.

INTEREST ON MAINLAND SECURITIES AND BANK DEPOSITS.

It is set forth in the submissions that ever since the incorporation of the Ewa Plantation Company Castle & Cooke, Limited, an Hawaiian corporation, has been its general agent at Honolulu and during upwards of twenty years last past Welch & Company, a California corporation with offices in San Francisco, has been the agent at that place of said Castle & Cooke, Limited, and at all times during said period the sugar produced by said Ewa Plantation Company has been sold on the mainland of the United States and the proceeds of sale have been received by said Welch [29] & Company and deposited in California banks and credited on its books to Castle & Cooke, Limited, for the account of said Ewa Plantation Company,

against which credits said Ewa Plantation Company has drawn from time to time as money was required by it for the payment of the expenses of its plantation and dividends upon its stock; that bonds and notes of foreign (mainland) railroad and industrial corporations were purchased by said Welch & Company for the account of said Ewa Plantation Company with surplus moneys of the latter so held as aforesaid by the former company and the said bonds and notes thereafter until they were sold on the mainland remained on deposit with said Welch & Company and none of said bonds and notes or the proceeds with which they were purchased have been held in said Territory nor have they been physically present therein at any time, that during the period of upwards of twenty years last past Alexander & Baldwin, Limited, an Hawaiian corporation having offices in Hawaii, California and New York, has been the agent of the Hawaiian Sugar Company; that the president of said Alexander & Baldwin, Limited, was and is in charge of its said California offices and other officers or employees thereof or representatives of said Hawaiian Sugar Company with power to effect transfers of its stock which is listed on the San Francisco stock exchange; that at all times during said period the sugar produced by said Hawaiian Sugar Company has been sold on the mainland of the United States and the proceeds of sale have been received by said Alexander & Baldwin, Limited, at either one or the other of its said offices on the mainland and there credited to the account

of said Hawaiian Sugar Company, against which said credit said Hawaiian Sugar Company has drawn from time to time as money was required by it for the payment of the expenses of its plantation and dividends upon its stock; that bonds of certain municipalities on the mainland of the [30] United States and of foreign (mainland) railroad corporations were purchased on the mainland by said Alexander & Baldwin, Limited, for the account of said Hawaiian Sugar Company with surplus moneys of the latter so held as aforesaid by the former company and said bonds thereafter until they were sold by said Alexander & Baldwin, Limited, on said mainland were held by it at its offices in California or New York and none of such bonds have been held in said Territory nor have they or said proceeds with which they were purchased been physically present therein at any time.

The Ewa Plantation Company and Hawaiian Sugar Company, respectively, deducted the interest arising from these investments as income for the year 1920 in its territorial income tax return, the amount deducted by the Ewa Plantation Company being \$52,442.23, and the amount deducted by the Hawaiian Sugar Company being \$32,659.66. Upon these facts it is the contention of said companies that the interest accruing from said bonds, notes and bank deposits was not taxable as income derived from property owned in the Territory of Hawaii or otherwise under the laws of said Territory. On the other hand it is claimed by the

assessor that said interest upon said bonds, notes and bank deposits was and is taxable income of said companies under the laws of Hawaii. It is agreed that should the contentions of the assessor be sustained the amount of income tax payable by said Ewa Plantation Company should be increased by the sum of \$2097.68 over the amount shown by the company's said return, and that the amount of income tax payable by said Hawaiian Sugar Company should be increased by the sum of \$1306.56 over the amount shown by the company's said return.

In the case of the latter company there is an attempt to draw a distinction between interest on mainland and foreign [31] investments and municipal bonds of mainland cities. We think these investments are all on the same plane so far as the principles involved are concerned and will be dealt with in this opinion accordingly.

It is regrettable that while the submissions contain statements to the effect that the proceeds of the sales of sugar by the mainland agencies of the taxpayers were placed to the general credit of the local companies to be drawn against from time to time as funds were required by them for the payment of their operating expenses, etc., the submissions are silent respecting the disposition and use of the income derived from the mainland investments now in question. In the absence of a showing to the contrary we are led to assume that the income received from these mainland securities and bank deposits was dealt with in the same manner as the proceeds from the sales of sugar.

The statute by virtue of which the assessor claims the income from these investments is properly taxable as income is section 1306, R. L. 1915. This statute reads as follows: "On corporation income. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent on the net profit or income above actual operating and business expenses derived during each taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created and organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies, taxed on a percentage of the premiums under the authority of another law." If this statute be stripped of the language not material to the cases at bar it would read: [32] "There shall be levied, assessed, collected and paid annually a tax of two per cent on the net income from all property owned in the Territory of Hawaii of all corporations doing business for profit in the Territory, no matter where created or organized." At the very outset counsel for the Territory concede that the phrase "owned in Hawaii" as employed in section 1306 must be taken as referring to the property and not the owner and the final form of the question is, "Are these bonds and deposits property

in Hawaii," and that "the case stands as though the statute read 'income from property in Hawaii owned by the taxpayer.'" We are not as ready as counsel to accept this construction of the meaning of the statute. It seems to us that it could be strongly argued that the phrase "property owned in Hawaii" has reference to the place of ownership and not to the location of the property. We are referred to the rule that in the construction of a statute the language employed should be taken in its common and usual signification and we are reminded that if a person were asked, "What property do you own in the Territory?" he would not in answering enumerate bonds and notes of foreign or mainland corporations or deposits in foreign or mainland banks. This may be true, but on the other hand if the San Francisco agents of these corporations were asked in respect to the property in question, "Where are these bonds, notes or bank credits owned?" the answer obviously would be, "In the Territory of Hawaii," and that answer would be entirely correct. We will not pursue this discussion further for the reason that even adopting the construction placed upon the statute by the parties the result will be the same.

If it be conceded that the statute refers to the income from property situated in Hawaii the position of the assessor can [33] only be sustained by invoking the doctrine of the maxim *mobilia sequuntur personam*, that is to say, that movables follow the person of the owner. Counsel for the taxpayers urge that the maxim has been repudiated in this

jurisdiction by the supreme court in Hackfeld vs. Minister of Finance, 3 Haw. 292; Hackfeld vs. Luce, 4 Haw. 172, and Estate of Hall, 19 Haw. 531. It is further contended that if the maxim is an enforceable rule in this jurisdiction yet under the circumstances here divulged the bonds, notes, etc., have become localized and thus have acquired a business situs in San Francisco. Counsel for the taxpayers cite many authorities bearing upon the question, the leading ones being State Tax on Foreign held Bonds, 15 Wall. 300; New Orleans vs. Stempel, 175 U. S. 309; Bristol vs. Washington County, 177 U. S. 133; Union Transit Co. vs. Kentucky, 199 U. S. 194; Liverpool & London & Globe Ins. Co. vs. Board of Assessors, 221 U. S. 346; DeGanay vs. Lederer, 250 U. S. 376. The general trend of these authorities is that tangible personal property permanently located in a State other than the domicile of the owner acquires a situs and is subject to be taxed irrespective of the domicile of the owner and any attempt on the part of the State in which the owner is domiciled to tax such property is unlawful; that the maxim *mobilia sequuntur personam* is a legal fiction to be resorted to only when convenience and justice require. It is further held that bonds and other negotiable instruments are becoming more and more to be looked upon and regarded as property and not merely as evidence of debt. The case of DeGanay vs. Lederer is the leading case and perhaps the strongest cited in support of the position maintained by counsel of the taxpayers. In that case certain stocks and bonds is-

sued by Pennsylvania corporations and mortgages secured on real estate in the same State were owned by an alien resident of France and were in the hands [34] of an agent in this country acting under a power of attorney which authorized and empowered the agent to sell, assign and transfer any of the property and to invest and reinvest the proceeds as it might deem best in the management of the business and affairs of the owner. The question was whether the income from this property was subject to tax under the federal income tax law of October 3, 1913, as income from property owned in the United States by persons residing elsewhere, and it was held that it was in the following language: "We have no doubt that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. It is only necessary to refer to some of the decisions of this Court. New Orleans vs. Stempel, 175 U. S. 309; Bristol vs. Washington County, 177 U. S. 133; Blackstone vs. Miller, *supra*; State Board of Assessors vs. Comptoir National d'Escompte, 191 U. S. 388; Carstairs vs. Cochran, 193 U. S. 10; Scottish

Union & National Ins. Co. vs. Bowland, 196 U. S. 611; Wheeler vs. New York, 233 U. S. 434, 439; Iowa vs. Slimmer, 248 U. S. 115, 120. Shares of stock in national banks, this Court has held, for the purpose of taxation may be separated from the domicile of the owner, and taxed at the place where held. Tappen vs. Merchants' National Bank, 19 Wall. 490. In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages [35] were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property within the United States within the meaning of Congress as expressed in the statute under consideration."

It is worthy of note that in the DeGanay case the Court emphasized the fact that the stocks, bonds and mortgages were held in Pennsylvania under a

power of attorney which gave authority to the agent to sell, assign and transfer any of them and to invest and reinvest the proceeds of sale as it might deem best in the management of the business and affairs of the principal. No such situation exists in the cases at bar. The mainland agents of the taxpayers were apparently clothed only with authority to purchase and hold the securities and as the income thereon was received to place the same to the credit of their principals to be drawn upon from time to time as money was required for the payment of the expenses of their plantation and dividends upon their stock. These securities therefore were not localized nor did they enjoy a business situs such as is referred to in the DeGanay case. But even in that case, while the Court held that they were subject to the federal income tax law because of their local situs within the United States, the Court did not infer by that that the income thereof would not have been taxable at the domicile of their owner; and the same may be said of the [36] income from the securities now in question. The mere fact that such income might be taxable in Hawaii under our local statute is no authority for holding that the same income might not be taxed in the State of California under the income tax laws of that state, for liability to taxation in one State does not necessarily exclude liability in another. Kidd vs. Alabama, 188 U. S. 730, 732; Hawley vs. Malden, 232 U. S. 1, 13. Kirtland vs. Hotchkiss, 100 U. S. 491, is a case concerning Illinois bonds secured by a deed of trust upon prop-

erty situated in the latter State. In that case the Court held that the debt "although a species of intangible property may for the purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois.

* * * The debt then having its situs at the creditor's residence, both he and it are for the purposes of taxation within the jurisdiction of the State." The general principles laid down in the Kirtland-Hotchkiss decision are referred to in *Fidelity & Columbia Trust Co. vs. Louisville*, 245 U. S. 54, at 59, as affirming and assuming to be the law in every subsequent case, citing *Bonaparte vs. Appeal Tax Court*, 104 U. S. 592; *Pullman's Palace Car Co. vs. Pennsylvania*, 141 U. S. 18, 29, 31; *Savings & Loan Society vs. Multnomah County*, 169 U. S. 421, 431; *New Orleans vs. Stempel*, *supra*; *Liverpool & London & Globe Ins. Co. vs. Assessor*, *supra*.

And finally the principle involved was again passed upon in the late case of *Maguire vs. Trefry*, 253 U. S. 12. This is not only a most recent case but is we think the controlling authority. [37] The question in that case was whether the income received by the beneficiary from a trust estate con-

sisting of bonds and equipment certificates held and administered by the trustee in another State is taxable by the State of the beneficiary's domicile. The question was answered in the affirmative. It appears that the beneficiary resided in the State of Massachusetts and was taxed upon income from a trust created by the will of one Matilda P. McArthur, formerly of Philadelphia. The securities consisting of bonds of other corporations and certain certificates of the Southern Railway Equipment Company were held in the possession of the trustees in Philadelphia and the trust was administered under the laws of the State of Pennsylvania. The tax commissioner of the Commonwealth of Massachusetts attempted to levy a tax upon the revenues derived by the beneficiary from said securities under the income tax statute of that State. In its opinion the Court says: "It is true that in some instances we have held that bonds and bills and notes although evidences of debt have come to be regarded as property which may acquire a taxable situs at the place where they are kept, which may be elsewhere than at the domicile of the owner. These cases rest upon the principle that such instruments are more than mere evidences of debt, and may be taxed in the jurisdiction where located and where they receive the protection of local law and authority. * * * At the last term we held in DeGanay vs. Lederer, 250 U. S. 376, that stocks and bonds issued by domestic corporations, and mortgages secured on domestic real estate, although owned by an alien nonresident, but in the hands of

an agent in this country with authority to deal with them, was subject to the Income Tax Law of October 3, 1913, 38 Stat. 166. In the present case we are not dealing with the right to tax securities which have acquired a local situs but are concerned with the right of the State to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered [38] under the laws of another State. In *Fidelity & Columbia Trust Company vs. Louisville*, 245 U. S. 54, we held that a bank deposit of a resident of Kentucky in the bank of another State, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Refrigerator Transit Co. vs. Kentucky*, *supra*, was distinguished and the principle was affirmed that the State of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of another State. This is the general rule recognized in the maxim *mobilia sequuntur personam*, and justifying, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application and may yield to the exigencies of particular situations. But we think it is applicable here. It is true that the legal title of property is held by the trustee in Pennsylvania, but it is so held for the benefit of the beneficiary of the trust and such beneficiary has an equitable right, title and interest distinct from its legal ownership. * * * It is this prop-

erty right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts. The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. * * * The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. *Kirtland vs. Hotchkiss, 100 U. S. 491.*"

This case is important for here in the last word upon the subject the Supreme Court of the United States has not only adopted and applied the maxim *mobilia sequuntur personam* but has [39] directly reaffirmed the decision in *Kirtland vs. Hotchkiss*. In *Union Transit Co. vs. Kentucky, supra*, the Court points out that stocks, bonds, notes and choses in action are classified as intangible property and a clear distinction is drawn between that kind of property and tangible personal property such as railway cars having a situs of their own and taxable only in the territorial limits of that situs. But with intangible personal property such as stocks, bonds and bank credits the rule ordinarily is different. This class of property takes the situs of the domicile of its owner by virtue of the maxim *mobilia sequuntur personam*, except under unusual circumstances which do not exist in the cases at bar.

The further point is made by counsel for the tax-payers that the local supreme court in the three Hawaiian cases *supra* has repudiated entirely the

maxim *mobilia sequuntur personam* but with this we cannot agree. Some of the expressions made use of would perhaps lead to that inference but after a careful review of those opinions, taken in the light of the law and facts involved, we conclude that the most that ought to be said of them is that the Court merely intended to hold, as the Supreme Court of the United States has since held in *Maguire vs. Trefry, supra*, that the maxim is not of universal application and may yield to the exigencies of particular circumstances.

And finally it is urged that "at no time heretofore has said assessor or his predecessors in office considered income derived from such investments as taxable or included the same in assessing the incomes of corporations or individuals under the laws of the Territory" and that the rule of contemporaneous construction should be given great weight by this Court. The rule is that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is to be [40] regarded as a legitimate aid to statutory construction and is entitled to most respectful consideration and should not be disregarded or overturned except for cogent reasons. See *United States vs. Moore*, 95 U. S. 760, also *United States vs. Johnson*, 124 U. S. 236, at 253, and authorities there cited. But the rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of doubt and ambiguity. Courts will ordinarily make use of the contemporaneous

construction of a statute by executive and administrative officials as an aid to interpretation but an erroneous construction can never be binding upon the judiciary.

We conclude that the income in question was and is taxable as now claimed by the assessor.

LOSS ON SUGAR FACTORS STOCK AND MAINLAND BONDS.

The material facts are that during the years 1904-1917 the Ewa Plantation Company purchased 4,828 shares of the stock of the Sugar Factors Company paying therefor the par value of \$100 per share. The stock thereafter declined in value and finally in the year 1920 the plantation company sold its entire holdings in said stock at \$40 per share, thus sustaining a loss of \$289,608. The same facts exist in relation to the case of the Hawaiian Sugar Company except that the number of shares involved was 1770 and the loss was \$106,200. The taxpayers claimed these respective amounts as proper deductions from gross income in ascertaining the net profits for income tax purposes during the taxation period ending December 31, 1920. The statutory provisions applicable are found in sections 1306 and 1307, R. L. 1915, and section 1 of Act 157, S. L. 917 amending section 1308, R. L. 1915. Section 1308 as amended prescribes the manner of computing the income of corporations for taxation purposes and specifically permits the deduction [41] therefrom of "all losses actually sustained during the taxation period next preceding incurred

in trade or arising from losses by fire not covered by insurance or losses otherwise actually incurred."

Counsel for the Territory concede that the transactions consisting of the purchase and sale of this stock resulted in losses in the above amounts to the two companies and they further concede that these losses have been actually sustained or actually incurred by the two companies as distinguished from losses which are merely conjectural or estimated; but they make the point, which they rely upon exclusively, that the losses were not sustained within the taxation period now in question, which was the calendar year 1920. They point out that the statute expressly provides that all losses actually sustained must be sustained during the taxation period preceding January 1 of the year in which the tax is imposed. They assert that the stock fluctuated in value from time to time between the date of the purchase and the date of sale and that the losses which the sales demonstrated and fixed in amount were the result of the entire transaction covering the whole period of years in which they were held, and from these facts they draw the conclusion that the losses are not attributable to any one year of that series; that while the losses were "ascertained" at the time of the sale, to wit, in 1920, they were not "sustained" in that year.

The three leading cases relied upon by counsel for the Territory are *In re Taxes Pacific Guano & Fertilizer Co.*, 16 Haw. 552; *Appeal of J. B. Castle*, 18 Haw. 129, and *Gray vs. Darlington*, 15 Wall. 63. In the Pacific Guano case the taxpayer in 1894 paid \$85,000 for all of the Laysan Island guano rights

in the belief and upon the advice of experts that there were about 85,000 tons of guano on the island. In 1903 the company discovered that there was [42] only about half of the anticipated amount of guano on the island and during that taxation period the company wrote off \$50,000 to account of profit and loss and claimed that amount to be a loss deductible from its income for that year. It was held by this Court that "the loss which was finally ascertained upon the termination of that business did not occur at the time when it was learned that the guano supply had failed, but it occurred when the purchase money was paid," and the Court proceeded to say: "In one sense a loss is made at the time when one learns that he has not got what he thought he had. In another sense, and as we think in the meaning of the statute, there is in such case no actual loss other than results from an unfortunate investment at the outset." With that opinion we are in entire accord. But in the present case we are dealing with corporation stock which for a series of years following its purchase had fluctuated. It was held during the entire time by the purchaser and finally sold at the then prevailing market price. The losses it seems to us were sustained or incurred at the time of the sale. If that were not true the loss incurred by the purchaser of this class of property which was held over a number of years and during the period of a fluctuating market could never be determined for the simple reason that it could not be ascertained at what particular period the loss actually occurred.

The courts have universally adopted the reasonable, and we might add the only fair, method of computing the loss, and that is by taking the difference between the cost price and the amount realized at the date of sale, and if the latter amount is less than the former then the loss is reckoned as having been sustained at the date of sale. A corporation possessing securities such as stocks and bonds will not be allowed to deduct from gross income an amount claimed as a loss on account of shrinkage in value of such securities through market fluctuations but will in such cases be allowed [43] any loss actually suffered when the securities are disposed of.

The decision of this Court In re Appeal of J. B. Castle, *supra*, asserts a mere conclusion, entirely devoid of any reasons therefor except that it is based upon the decision in Gray vs. Darlington, *supra*, a case involving the construction of the Revenue Act of 1867 (14 Stat. 477, c. 169).

The United States Supreme Court in a recent decision (Hays, Collector, vs. Gauley Mountain Coal Co., 247 U. S. 189) distinguished the corporation excise tax act of August 5, 1909, from the act of March 2, 1867, under which Gray vs. Darlington was decided, and held that where property is sold by a corporation at an advance over the original purchase price the amount of the advance must be deemed to be a gain or profit for the purpose of computing income for taxation under the federal statute. See also Merchants' Loan & Trust Co. vs.

Smietanka, decided by the federal Supreme Court March 28, 1921, and Holmes, Fed. Taxes, p. 632.

In October, 1913, Congress enacted an Income Tax Act which provided that in case of persons there should be deducted from gross income in arriving at taxable income "losses actually sustained during the year incurred in trade or arising from fires, storms and shipwrecks not compensated for by insurance or otherwise," and in the case of corporations it was provided that there should be deducted "all losses actually sustained within the year and not compensated as insurance or otherwise." The treasury department through regulations issued by it took the position in respect to this act as well as subsequent acts containing similar language that where a corporation possesses securities such as stocks and bonds it cannot be allowed to deduct from gross income any amount claimed as a loss on account of the shrinkage in value of such securities through fluctuations on the market or otherwise, [44] the only losses to be allowed in such cases being those actually suffered when the securities mature or are disposed of.

There are several subsequent treasury department regulations to the same effect, the latest one called to our attention being Article 44, Regulations 451, April 7, 1919, which reads: "Shrinkage in securities and stocks. A person possessing securities such as stocks and bonds cannot deduct from gross income any amount claimed as a loss on account of the shrinkage in value of such securities through fluctuations in the market or other-

wise. The loss allowable in such cases is that actually suffered when the securities mature or are disposed of." The decisions and rulings promulgated by the treasury department are of course not binding upon the Court but as indicated *supra* they are entitled to consideration. These rulings are significant when considered in light of the fact that the language of the federal statute is no broader or more comprehensive than the territorial statute now under consideration.

There is a dearth of federal judicial authority on the question before us, due no doubt to the fact that the federal Government has uniformly acquiesced in the position here assumed by the taxpayers and which we deem to be the only fair and practicable method of ascertaining losses of the nature involved. It is a notorious fact that during the last decade all stocks and bonds throughout the world have violently fluctuated with the greatest frequency, often changing in value from time to time with kaleidoscopic rapidity. This fact alone would render it impossible to determine the actual time at which the losses were sustained by the taxpayers, if the method of ascertaining those losses proposed by counsel for the assessor were adopted, and would deprive the taxpayers of the benefit of deductions from gross income caused by losses which it is conceded they actually sustained. [45]

All that has been said respecting the losses suffered by the taxpayers on the Sugar Factors Company stock applies with equal force to their losses in respect to the various railroad, industrial, mu-

nicipal and United States bonds, and sold as aforesaid in 1920.

We therefore hold that the losses sustained by the taxpayers through the sales of stocks and bonds referred to in the third and fourth paragraphs above, realized upon during the year 1920, amounting in the case of the Ewa Plantation Company to \$487,432.11, and in the case of the Hawaiian Sugar Company to \$268,431.78, are deductible as losses in computing the income taxes of said respective companies for the year 1920 under the facts set forth in the submission herein.

DEPRECIATION OF LEASEHOLD.

This controversy affects only the Hawaiian Sugar Company. It appears in the submission that the company's plantation is situated entirely upon leasehold lands which are covered by a single lease. The lease was executed for a term of fifty years from January 1, 1889. The lease as originally executed by Gay & Robinson as lessors was made to one W. R. Watson as lessee, who in the same year assigned the same to the Hawaiian Sugar Company for the consideration of \$50,000. It appears that the leasehold interests were carried on the books of the company at that figure, less an annual amount written off for depreciation, until 1899 when a reappraisement was made of the property of the company and the value of the leasehold was fixed at \$300,000. This leasehold was from that date carried on the books of the company until 1902 when \$8,333 was written off for depreciation, leaving a balance of \$291,667, and thereafter the sum of

\$8,101.86 was written off each year until 1920, this being the amount which if [46] written off each year from 1902 would amortize the said sum of \$291,667 at the time of the expiration of the lease, to wit, December 31, 1938. During this entire period and until the passage of Act 157, S. L. 1917, which became effective April 27, 1917, depreciation or exhaustion was not an allowable deduction under the laws of the Territory and no item for depreciation or exhaustion was claimed by the company in respect to said leasehold until it filed its tax return for the year 1917 when it claimed and was allowed among other items the sum of \$8,101.86 as depreciation of said leasehold. Deductions of a like amount were also claimed and allowed for each of the two succeeding years, to wit, 1918 and 1919. In the year 1919 the company for federal income tax purposes reappraised and revalued the leasehold in question fixing the amount of the value thereof as of March 1, 1913 (the effective date of the federal statute), at the sum of \$2,069,134.58, in addition to the balance which it estimated would remain on the purchase price of \$50,000 of said leasehold after deducting therefrom as depreciation at the rate of \$1001.64 every year for the then unexpired portion of the term of said leasehold, the latter being then estimated as the proper amount to write off from such purchase price in order to amortize its entire amount by the date of the expiration of the lease. The company in order to amortize said value of the leasehold as of March 1, 1913, by the date of the expiration thereof, and in making its

return for the year 1920, deducted therefrom on account of the depreciation or exhaustion of said lease upon the value thereof fixed by it as aforesaid the sum of \$81,093.30, and the question now presented is whether under the facts stated and the statutes of the Territory this item is properly deductible. That part of Act 157, S. L. 1917, which is material here is as follows: "In computing income the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property, shall be deducted, and also all interest paid by [47] such person or corporation on existing indebtedness. And all Government taxes, and license fees, paid within the taxation period next preceding shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the same, whether such person or corporation be owner, tenant or mortgagor; also all losses actually sustained during the taxation period next preceding incurred in trade, or arising from losses by fire not covered by insurance, or losses otherwise actually incurred, and including a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in a business or trade; provided, however, that in no case shall such depreciation exceed the amount actually shown by and as written off the books."

The deduction clause of the foregoing local statute is copied from the federal Income Tax Act of 1916. The controversy presents two main questions. The first is whether depreciation or exhaustion of a lease

is an allowable deduction under the income tax laws of Hawaii, and if this question is answered in the affirmative then the second question arises, to wit, how should the amount of such depreciation or exhaustion be determined.

It is urged by counsel for the Territory that there can be no such thing as either exhaustion, wear or tear of intangible property; that these terms refer solely to physical property and can in no case be held to apply to leasehold interests. We agree with counsel that, taken in their usual and ordinary sense, the words "wear and tear" could not be applied to a leasehold, but we are not ready to agree that there cannot be an exhaustion of a leasehold. It seems to us that a leasehold for a term of years is gradually being exhausted as the term or life thereof is shortened by the efflux of time.

It is further urged by counsel for the Territory that even if a leasehold may be exhausted the exhaustion under the [48] statute must arise out of the use or employment of the property in the business or trade; that the passing away of the lease by the efflux of time did not arise out of its use or employment in the plantation business of the company and was not caused by any such use or employment; that by the very nature of things the exhaustion of the lease was bound to occur irrespective of whether or not the lands covered by the demise or the lease itself were used or employed in the business; that the lands might lie idle during the whole tenure of the lease yet the passing of

the term would be going on in spite of the nonusage. It must be conceded that this is an argument of much plausibility and in the interpretation of the statute in this respect a question of much difficulty is encountered. If we were to indulge in the refinements of the lexicographer or of the strict grammarian we would perhaps be led to an adoption of the views of counsel for the Territory. On the other hand, if in reading the statute we interpret its phraseology in the natural and obvious sense in which that phraseology was employed and without too much regard to form (see Eisner vs. Macomber, 252 U. S. 189, 206) we must conclude that it was the intent and purpose of the legislature to permit the taxpayer in computing his income to deduct therefrom actual losses incurred during the taxation period due to the exhaustion of all intangible property arising out of its use or employment in his trade or business, including any loss by reason of the exhaustion of a leasehold by efflux of time if such leasehold was actually employed in the trade or business. This is in line with the construction placed upon the federal Income Tax Act of 1916 by the treasury department of the National Government under a statute containing language identical to our own.

Having determined that the loss sustained by reason of the exhaustion by efflux of time of the lease in question is under [49] the fact and circumstances of the case at bar properly deductible from gross income the method to be employed in ascertaining the amount of such deduction will next

be inquired into. Counsel for the taxpayer take the position that because in the year 1919 the company appraised the leasehold as of March 1, 1913, at a valuation of \$2,069,134.58 and because it is stipulated in the submission that the value of the leasehold was as great on January 1, 1917, as on March 1, 1913, the valuation thus fixed should control and be taken as the proper valuation thereof throughout the life of the lease. It does not follow at all that because the company appraised the leasehold at the value above stated as of March 1, 1913, the true value thereof at that or any subsequent time was ascertained nor could any such appraisement be binding upon the assessor or upon this Court for the actual value and not the value arbitrarily fixed should determine the amount to be cared for by depreciation. (Black on Income Tax, 4th ed., sec. 187.) It would be useful to know the valuation placed upon the leasehold by the company for the purpose of fixing the property tax to be paid thereon to the Territory. This record of course is available and would, if it indicates that the leasehold was returned by the taxpayer at the valuation of \$2,069,134.58, be persuasive evidence of the correctness of that valuation. On the other hand, if the valuation was fixed at a less amount it would tend to refute the claim now made by the company and would indicate an inconsistency which cannot be sanctioned for of course the taxpayer will not be allowed to use one valuation for deduction purposes under the income tax law and another valuation for the purpose of fixing the amount of

property tax. We are, however, strongly inclined to assume that the property tax upon the leasehold has been paid on the valuation of \$300,000 placed thereon in 1899 less of course a reasonable amount for depreciation. This assumption is based upon the fact that it is shown by the record that the valuation of \$300,000 was employed [50] by the taxpayer and assessor in arriving at the proper amount of deduction to be allowed as an offset against gross income for the years 1917, 1918 and 1919.

The proper course would have been for the parties, following the 31st day of December, 1917, to reappraise the leasehold at its then true value and based thereon to fix a proper amount to be allowed for exhaustion of the leasehold occurring between the effective date of the act and the end of the taxation period, to wit, April 27, 1917, to December 31, 1917, this course to be repeated thereafter at the end of each succeeding taxation period until the termination of the lease, for a lessee should be allowed a deduction to provide for the amortization of his capital investment on the property measured by the value of the life of the lease. The life of the lease is definitely fixed but the capital investment will vary as the value of the leasehold due to economic causes changes and it follows that the amount required to amortize the capital investment will also change from time to time. But this course the parties did not pursue either in 1917 or in the two following years but instead they merely acquiesced in the value fixed in 1899 and accepted

the sum of \$8,101.86 for each of said years as a proper amount to be written off on account of the exhaustion of the leasehold.

We are only concerned with the value of the leasehold and the amount of depreciation for the year 1920 but we have nothing in the record before us from which that value or the amount to be allowed for exhaustion covering that year can be determined. Each taxation period should be dealt with separately and independently from every other taxation period. The value of property and the amount of income for each period should be determined annually. To say that the value of taxable assets either for property tax or income tax purposes should for all time remain the same as that [51] value happened to be at the date the statute levying the tax became effective is to assert a proposition palpably unsound, untenable and grossly unfair to both the taxpayer and to the government. Property values shift from year to year and these changes should be taken into account in determining the amount of taxes to be required of each taxpayer annually. The value of the leasehold in question as one of the capital assets of the Hawaiian Sugar Company has varied in the past and will vary in the future as the price of sugar advances, at least so long as the leasehold interests are devoted to the production of sugar.

The mere stating of this well-known economic fact sets the error of the contention of counsel for the taxpayer in a strong light. The decision in Doyle vs. Mitchell, 247 U. S. 179, is cited as a

judicial recognition and approval of the principle that the value of the leasehold should be taken as on the effective date of the act. With that principle we agree but we do not concede, nor is it held in Doyle vs. Mitchell that the value thus determined shall during all subsequent years remain the same and become the criteria for the purpose of arriving at the amount of exhaustion or diminution of capital for income tax purposes. In the case just cited the question arose under the federal excise tax of 1909 and turned upon the proposition that Congress did not intend by the use of the term "income" to include the proceeds of capital assets sold or converted during the year. The company had bought certain stumppage in 1903 at \$20 per acre and on December 31, 1908, the actual value had increased to \$40 per acre. Under the act the company made a return for each year 1909, 1910, 1911 and 1912, and in each instance deducted from its gross receipts the market value (\$40 per acre) as of December 31, 1908, of the stumppage cut and converted during the year covered by the tax. The commissioner of internal revenue refused to allow the difference [52] between the cost of the stumppage, that is, \$20 per acre, and the market value thereof, to wit, \$40 per acre. The Court in its opinion sustained the taxpayer but pointed out that there was "no change in market values during these years." But had there been a change in the market value of the stumppage during the years following December 31, 1908, would the result have been the same? We think not. Nor is the decision in Merchants Loan & Trust Co. vs. Smietanka,

supra, and the three companion cases decided by the Supreme Court of the United States on March 28, 1921, any authority for the contention of counsel for the taxpayer. These opinions merely hold that where property is of a certain value at the effective date of the taxing act and is thereafter sold at an advanced price the profits thus realized by the seller is income under the federal statute.

We therefore hold that the actual amount of depreciation in the value of the leasehold should be allowed as a deduction in computing the income tax of the Hawaiian Sugar Company for the year 1920 under the laws of the Territory of Hawaii, but because the value of the leasehold at the end of the year 1920 has not been properly ascertained and is unascertainable from the record before us we are not able to fix the amount.

A separate judgment will be entered in each of the proceedings conformably to the views expressed in this opinion.

A. G. M. ROBERTSON, W. L. STANLEY, U. E. WILD, H. HOLMES and W. F. FREAR (ROBERTSON, CASTLE & OLSON; FREAR, PROSSER, ANDERSON & MARX; SMITH, WARREN, STANLEY & VITOUSEK and H. HOLMES on the Brief), for the Taxpayers.

A. PERRY (H. IRWIN, Attorney General, and PERRY & MATTHEWMAN on the Brief), for the Tax Assessor.

JAMES L. COKE.
S. B. KEMP.
W. S. EDINGS.

[Endorsed]: Nos. 1327 and 1328. Supreme Court, Territory of Hawaii. October Term, 1921. Ewa Plantation Company vs. Charles T. Wilder, Tax Assessor First Taxation Division, Territory of Hawaii. Hawaiian Sugar Company vs. Charles T. Wilder, Tax Assessor First Taxation Division, Territory of Hawaii. Opinion. Filed February 28, 1922, at 11:45 A. M. (Sig.) J. A. Thompson, Clerk.
[53]

In the Supreme Court of the Territory of Hawaii.
October Term, 1921.

ORIGINAL—No. 1327.

EW A PLANTATION COMPANY
vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of Hawaii.

Judgment.

SUBMISSION WITHOUT ACTION.

This cause having been instituted in this Court upon a submission, joined in by both parties, upon a statement of agreed facts, in conformity with the provisions of the statute relating to such cases, and all parties having been duly heard in argument, it is by this Court **CONSIDERED AND ADJUDGED:**

I.

Referring to item (19) of Schedule "A" of the Income Tax Return filed by the plaintiff with the defendant on February 28, 1921, relating to the

plaintiff's income for the year 1920, which item is in said return designated "Strike Claim Settlement,"—that the said item, returned by the plaintiff at \$2,324,931.75 be and it hereby is increased to \$2,791,697.72; and that the amount of income taxable payable with reference to the said item be and it hereby is increased by the sum of \$18,670.60 over the amount shown by the plaintiff's said return.
[54]

II.

Referring to the deduction claimed in Schedule "B" of said Tax Return by this plaintiff, namely, item "(2) Interest on Mainland and Foreign Investments," that the said deduction be and it hereby is disallowed; and that the amount of income taxes payable by the plaintiff with reference to the said item be and it hereby is increased by the sum of \$2,097.68 over the amount shown by the plaintiff's said return.

III.

Referring to the deduction claimed in Schedule "B" of said Tax Return by this plaintiff, namely, Item "15-(c) Loss on Sale of Sugar Factors Stock," that the said deduction be and it hereby is allowed; and that in this respect the plaintiff's said return stand as made.

IV.

Referring to the deduction claimed in Schedule "B" of said Tax Return by this plaintiff, namely, Item "15-(d) Loss on Sale of Miscellaneous Bonds," that the said deduction be and it hereby is

allowed; and that in this respect the plaintiff's said return stand as made.

V.

THEREFORE, IT IS CONSIDERED AND ADJUDGED that the said Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, do recover from the said Ewa Plantation Company the sum of Twenty Thousand Seven Hundred and Sixty-eight and 28/100 (\$20,768.28) Dollars.

Dated Honolulu, T. H., April 7, 1922.

By the Court.

[Seal] J. A. THOMPSON,

Clerk of the Above-entitled Court. [55]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Co., Ltd., vs. Charles T. Wilder, Tax Assessor. Submission on Case Agreed. Judgment. Filed April 7, 1922, at 11:05 A. M. J. A. Thompson, Clerk.
[56]

In the Supreme Court of the Territory of Hawaii.

ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of
Hawaii,

Defendant in Error.

**Petition for Writ of Error for the United States
Circuit Court of Appeals for the Ninth Circuit
to the Supreme Court of the Territory of
Hawaii.**

SUBMISSION WITHOUT ACTION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Ewa Plantation Company, petitioner in the above-entitled cause, feeling itself aggrieved by the decision and judgment in said cause, which judgment was entered by the Supreme Court of the Territory of Hawaii on the 7th day of April, A. D. 1922, and complaining says that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in assignments of error filed herein, to which reference is hereby made; that the amount involved in said suit, exclusive of costs, exceeds the sum or value of Five Thousand Dollars (\$5000) and that it is a proper case to be reviewed by said Circuit Court of Appeals.

AND WHEREFORE your petitioner would respectfully pray that a writ of error be allowed to it in the above cause and that it be allowed to prosecute the same to the Honorable United States Circuit Court of Appeals for the Ninth Circuit under and [57] according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of security the petitioner shall give and furnish upon said writ of error; that the Clerk of the Supreme Court of

the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in this case duly authenticated for the correction and the errors so complained of and that a citation may issue.

And your petitioner will ever pray.

Dated, Honolulu, T. H., April 29th, 1922.

EWA PLANTATION COMPANY,
[Seal] By E. D. TENNEY,
Its President.
By CHAS. H. ATHERTON,
Its Treasurer.
ROBERTSON & CASTLE,
Attorneys for Petitioner.

Subscribed and sworn to before me this 29 day of April, 1922.

[Seal] CHAS. Y. AWANA,
Notary Public, First Judicial Circuit, Territory
of Hawaii.

The foregoing petition is granted, a writ of error allowed and the amount of bond on said writ of error is fixed at \$500.

Dated, April 29, 1922.

[Seal] E. C. PETERS,
Chief Justice. [58]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor for the First Taxation Division Territory of Hawaii. Defendant in Error. Petition for

Writ of Error for the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii. Filed April 29, 1922, at 9:35 A. M. J. A. Thompson, Clerk [59]

In the Supreme Court of the Territory of Hawaii.

ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the First Taxation Division, Territory of Hawaii,

Defendant in Error.

Assignment of Errors.

SUBMISSION WITHOUT ACTION.

Comes now Ewa Plantation Company, plaintiff in error in the above-entitled cause, and says there is manifest error in the record of proceedings in said cause in the Supreme Court of the Territory of Hawaii in this, to wit:

1. That said Supreme Court erred in holding that the entire sum of \$2,791,697.72 received by Ewa Plantation Company from the Hawaiian Sugar Planters' Association in 1920, by way of compensation for losses incurred by reason of the laborers' strike on the Island of Oahu, should be accounted for by said company as taxable income received during the year 1920.

2. That said Supreme Court erred in not holding that said sum of \$2,791,697.72 should be apportioned and the respective parts thereof so apportioned taken into account for income taxation purposes when and as the crops to which such parts respectively appertained, viz., the crops of 1920, 1921 and 1922, shall have been sold and the net results ascertained with reference to each of said crops. [60]

3. That said Supreme Court erred in holding that the doctrine of the maxim *mobilia sequuntur personam* has not been repudiated by judicial precedent in Hawaii with reference to taxation.

4. That said Supreme Court erred in not holding that even if said doctrine has not been so repudiated it should not be applied in this case under the circumstances set forth in paragraph 4 of the submission herein.

5. That said Supreme Court erred in holding that the case of Maguire vs. Trefry, 253 U. S. 12, is a controlling authority in the case at bar.

6. That said Supreme Court erred in holding that the sum of \$52,442.23 received by Ewa Plantation Company during the year 1920 as interest upon foreign investments, i. e., interest on the bonds and notes of mainland railroad and industrial corporations and upon deposits in mainland banks, was not legally deductible in ascertaining the taxable income of said company in its tax return for 1921.

7. That said Supreme Court erred in holding that said sum of \$52,442.23 constituted taxable income of said company.

8. That said Supreme Court erred in adjudging that the second sub-item under Item (19) of Schedule "A" of the income tax return of Ewa Plantation Company filed in February 28, 1921, relating to the income of said company for the year 1920 returned at \$2,324,931.75 should be increased to \$2,791,697.72, and that the income taxes payable with reference to the said item be increased by the sum of \$18,670.60 over the amount [61] shown by said company's said return.

9. That said Supreme Court erred in adjudging that the deduction claimed in Schedule "B" of the said income tax return of Ewa Plantation Company, viz., Item "(2) Interest on Mainland and Foreign Investments," should be disallowed and that the income taxes payable by said company with reference to the said item be increased by the sum of \$2,097.68 over the amount shown by said company's said return.

10. That said Supreme Court erred in rendering and entering judgment in favor of Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, to recover from Ewa Plantation Company the sum of \$20,768.28.

Dated at Honolulu, T. H., April 29, 1922.

ROBERTSON & CASTLE,
Attorneys for Plaintiff in Error. [62]

[Endorsed]: No. 1327, Supreme Court, Territory of Hawaii, Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor, etc., Defendant in Error. Assignment of Errors.

Filed April 29, 1922, at 9:35 A. M. J. A. Thompson, Clerk. [63]

In the Supreme Court of the Territory of Hawaii.
ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,
Plaintiff in Error,
vs.

**CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of
Hawaii,**
Defendant in Error.

Bond on Writ of Error.

SUBMISSION WITHOUT ACTION.

KNOW ALL MEN BY THESE PRESENTS:
That Ewa Plantation Company, as principal, and Albert N. Campbell, as surety, are held and firmly bound unto Charles T. Wilder in the penal sum of Five Hundred (\$500) Dollars, for the payment of which well and truly to be made, we do hereby, jointly and severally firmly bind ourselves and our respective heirs, successors, executors and administrators.

**THE CONDITION OF THIS OBLIGATION
IS SUCH, that**

WHEREAS, in an action heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principal was one party and the obligee was the other party to a submission without action, this said Supreme Court did, on the 7th day of April, 1922, render and enter

a judgment of said Supreme Court, wherein and whereby certain deductions from taxes were disallowed to the principal of this bond, and which judgment was in favor of the defendant in error, and

WHEREAS, said bounden principal has appealed from said judgment of the Supreme Court of the Territory of Hawaii to the [64] United States Circuit Court of Appeals for the Ninth Circuit, to the end that said decree of the Supreme Court of the Territory of Hawaii may be reviewed by said Circuit Court of Appeals of the Ninth Circuit, and has taken, or is about to take, such other and further proceedings as may be necessary to obtain a review by said United States Circuit Court of Appeals for the Ninth Circuit of the judgment of the said Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said bounden principal shall prosecute said appeal to final conclusion and effect, and shall answer all damages and costs if it fails to make its plea good, then the above obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, said principal and surety have hereunto set their hands and seals this 29th day of April, A. D. 1922.

EWA PLANTATION COMPANY,

By E. D. TENNEY, (Seal)

Its President.

By CHAS. H. ATHERTON,

Its Treasurer, Principal.

A. N. CAMPBELL,

Surety.

The foregoing bond is approved as to its form, as to its amount, and as to the sufficiency of its surety, this 29th day of April, A. D. 1922.

[Seal] E. C. PETERS,
Chief Justice of the Supreme Court of the Territory of Hawaii. [65]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor for the First Taxation Division Territory of Hawaii. Defendant in Error. Bond on Writ of Error. Filed April 29, 1922, at 9:35 A. M. J. A. Thompson, Clerk. [66]

In the Supreme Court of the Territory of Hawaii.
ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,
Plaintiff in Error,
vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of
Hawaii,
Defendant in Error.

Writ of Error.

SUBMISSION WITHOUT ACTION.

United States of America—ss.

The President of the United States of America to
the Honorable, the Judges of the Supreme
Court of the Territory of Hawaii, GREETING:
Because in the record and in the proceedings, as

also in the rendition of the judgment in said Supreme Court of the Territory of Hawaii before you, in the case of "Ewa Plantation Company vs. Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, Submission Without Action, Original No. 1327," a manifest error has happened to the great prejudice and damage of Ewa Plantation Company, petitioner, as is said and appears by the petition herein,—

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Justices of the United States Circuit Court of [67] Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in said Circuit Court thirty days after this date, and the record and proceedings aforesaid being inspected by the said Circuit Court of Appeals, may cause further to be done therein, to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 29th day of April, A. D. 1922.

ATTEST my hand and seal of the Supreme Court of the Territory of Hawaii, at the clerk's

office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal] J. A. THOMPSON,
Clerk of Supreme Court, Territory of Hawaii.

Allowed this 29th day of April, A. D. 1922.

[Seal] E. C. PETERS,
Chief Justice of Supreme Court, Territory of Hawaii. [68]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor, for the First Taxation Division Territory of Hawaii, Defendant in Error. Writ of Error. Filed April 29, 1922, at 9:35 A. M. J. A. Thompson, Clerk. [69]

In the Supreme Court of the Territory of Hawaii.

ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of
Hawaii.

Defendant in Error.

Citation on Writ of Error.

SUBMISSION WITHOUT ACTION.

United States of America—ss.

The President of the United States of America to
CHARLES T. WILDER, GREETING:
You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Ewa Plantation Company, is plaintiff in error and you are defendant in error, to show cause, if any there may be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 29th day of April, A. D. 1922.

Dated, Honolulu, April 29th, 1922.

[Seal] E. C. PETERS,
Chief Justice of the Supreme Court, Territory
of Hawaii. [70]

Due service of the foregoing citation and receipt
of a true copy thereof, this 29th day of April, 1922,
is hereby admitted.

CHARLES T. WILDER,
Tax Assessor for the First Taxation Division,
Territory of Hawaii,

By J. LIGHTFOOT,
Deputy Attorney General. [71]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error. vs. Charles T. Wilder,

Tax Assessor for the First Taxation Division,
Territory of Hawaii, Defendant in Error, Citation
on Writ of Error. Filed April 29, 1922, at
9:35 A. M., and Issued for Service. J. A. Thompson,
Clerk. Returned April 29, 1922, at 10:05 A. M.
J. A. Thompson, Clerk. [72]

In the Supreme Court of the Territory of Hawaii.

ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of Hawaii,
Defendant in Error.

Praecipe for Transcript of Record on Writ of Error.

SUBMISSION WITHOUT ACTION.

To James A. Thompson, Esq., Clerk, Supreme
Court, Territory of Hawaii:

You will please prepare a transcript of record
in the above-entitled cause to be filed in the office
of the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit, and include in said
transcript the following pleading, opinion, judgment
and papers on file in said cause, to wit:

1. Statement of agreed facts and submission, filed
April 29, 1921.
2. Opinion of the Supreme Court of the Territory
of Hawaii, filed February 28, 1922.
3. Judgment, entered April 7, 1922.

You will please annex to and transmit with the record such further papers as, according to the practice of the court, should be annexed and transmitted.

Dated Honolulu, T. H., April 29, 1922.

ROBERTSON & CASTLE,
Attorneys for Plaintiff in Error. [73]

[Endorsed]: No. 1327. In the Supreme Court of the Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, Defendant in Error. Praecept for Transcript of Record on Writ of Error. Filed April 29, 1922, at 9:35 A. M. J. A. Thompson, Clerk. [74]

In the Supreme Court of the Territory of Hawaii.
ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,
Plaintiff in Error,
vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of Hawaii,
Defendant in Error.

Amended Assignment of Errors.
SUBMISSION WITHOUT ACTION.

Comes now Ewa Plantation Company, plaintiff in error in the above-entitled cause, and says there is manifest error in the record of proceedings in said cause in the Supreme Court of the Territory of Hawaii in this, to wit:

1. That said Supreme Court erred in holding that the entire sum of \$2,791,697.72 received by Ewa Plantation Company from the Hawaiian Sugar Planters' Association in 1920, by way of compensation for losses incurred by reason of the laborers' strike on the Island of Oahu, should be accounted for by said company as taxable income received during the year 1920.

2. That said Supreme Court erred in not holding that said sum of \$2,791,697.72 should be apportioned and the respective parts thereof so apportioned taken into account for income taxation purposes when and as the crops to which such parts respectively appertained, viz., the crops of 1920, 1921 and 1922, shall have been sold and the net results ascertained with reference to each of said crops. [75]

3. That said Supreme Court erred in holding that the doctrine of the maxim *mobilia sequuntur personam* has not been repudiated by judicial precedent in Hawaii with reference to taxation.

4. That said Supreme Court erred in not holding that even if said doctrine has not been so repudiated it should not be applied in this case under the circumstances set forth in paragraph 4 of the submission herein.

5. That said Supreme Court erred in holding that the case of Maguire vs. Trefry, 253 U. S. 12, is a controlling authority in the case at bar.

6. That said Supreme Court erred in holding that the sum of \$52,442.23 received by Ewa Plantation Company during the year 1920 as interest upon foreign investments, i. e., interest on the bonds

and notes of mainland railroad and industrial corporations and upon deposits in mainland banks, was not legally deductible in ascertaining the taxable income of said company in its tax return for 1921.

7. That said Supreme Court erred in holding that said sum of \$52,442.23 constituted taxable income of said company.

8. That said Supreme Court erred in adjudging that the second sub-item under Item (19) of Schedule "A" of the income tax return of Ewa Plantation Company filed on February 28, 1921, relating to the income of said company for the year 1920 returned at \$2,324,931.75 should be increased to \$2,791,-697.72 and that the income taxes payable with reference to the said item be increased by the sum of \$18,-670.60 over the amount shown [76] by said company's said return.

9. That said Supreme Court erred in adjudging that the deduction claimed in Schedule "B" of the said income tax return of Ewa Plantation Company, viz., Item "(2) Interest on Mainland and Foreign Investments," should be disallowed and that the income taxes payable by said company with reference to the said item be increased by the sum of \$2,097.68 over the amount shown by said company's said return.

10. That said Supreme Court erred in rendering and entering judgment in favor of Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, to recover from Ewa Plantation Company the sum of \$20,768.28.

WHEREFORE the said plaintiff in error prays that the judgment of the Supreme Court of the Territory of Hawaii be vacated and set aside; that the said Court be ordered to correct the errors aforesaid, and to enter judgment in favor of said Ewa Plantation Company.

Dated, Honolulu, T. H., the 3d day of May, 1922.

ROBERTSON & CASTLE,

Attorneys for Plaintiff in Error.

Receipt of a copy of the foregoing amended assignment of errors admitted this 3d day of May, 1922.

J. LIGHTFOOT,

Acting Attorney General, Territory of Hawaii, Attorney for Defendant in Error. [77]

[Endorsed]: No. 1327. Supreme Court, Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, Defendants in Error. Assignment of Error. Filed May 3, 1922, at 3:35 P. M. J. A. Thompson, Clerk. [78]

In the Supreme Court of the Territory of Hawaii.

ORIGINAL—No. 1327.

EWA PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the First Taxation Division, Territory of Hawaii, Defendant in Error.

**Amended Praeclipe for Transcript of Record on
Writ of Error.**

SUBMISSION WITHOUT ACTION.

To James A. Thompson, Esq., Clerk, Supreme Court, Territory of Hawaii:

You will please prepare a transcript of record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleading, opinion, judgment and papers on file in said cause, to wit:

1. Statement of agreed facts and submission, filed April 29, 1921;
2. Opinion of the Supreme Court of the Territory of Hawaii, filed February 28, 1922;
3. Judgment, entered April 7, 1922.

You will please annex to and transmit with the record such further papers, as, according to the practice of the court, should be annexed and transmitted, including the amended assignment of errors.

Dated, Honolulu, T. H., May 10, 1922.

ROBERTSON & CASTLE,
Attorneys for Plaintiff in Error. [79]

[Endorsed]: No. 1327. Supreme Court, Territory of Hawaii. Ewa Plantation Company, Plaintiff in Error, vs. Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii. Amended Praeclipe for Transcript of Record on Writ of Error. Filed May 11, 1922, at 9:40 A. M. J. A. Thompson, Clerk. [80]

In the Supreme Court of the Territory of Hawaii.
October Term, 1921.

EW A PLANTATION COMPANY,

Plaintiff in Error,

vs.

CHARLES T. WILDER, Tax Assessor for the
First Taxation Division, Territory of Hawaii,
Defendant in Error.

Certificate of the Clerk of the Supreme Court of
the Territory of Hawaii and Return to Writ
of Error.

SUBMISSION WITHOUT ACTION.

Territory of Hawaii,
City and County of Honolulu,
United States of America,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 67 to 69, both inclusive of the foregoing transcript, and in pursuance of the praecipe, being pages 73 to 74, both inclusive, and the amended praecipe, being pages 79 to 80, both inclusive, to me directed, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 59, both inclusive, and pages 64 to 66, both inclusive, AND I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries

and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the case entitled in said court "Ewa Plantation Company, Plaintiff in Error, *versus* Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, Defendant in Error," and numbered 1327.

I DO FURTHER CERTIFY that the original citation on writ of error, with acknowledgment of receipt of a copy thereof by J. Lightfoot, [81] Deputy Attorney General, being pages 70 to 72, both inclusive; the original assignment of errors, being pages 60 to 63, both inclusive, and the original amended assignment of errors, being pages 75 to 78, both inclusive, of the foregoing transcript of record are hereto attached and herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$47.75, and that said amount has been paid by Messrs. Robertson & Castle, the attorneys for the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 16th day of May, A. D. 1922.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [82]

[Endorsed]: No. 3876. United States Circuit Court of Appeals for the Ninth Circuit. Ewa Plantation Company, a Hawaiian Corporation, Plaintiff in Error, vs. Charles T. Wilder, as Tax Assessor for the First Taxation Division, Territory of Hawaii, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed May 23, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. 3876

IN THE

United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

17

EWA PLANTATION COMPANY,
a Hawaiian Corporation,
Plaintiff-in-Error,
vs.

CHARLES T. WILDER,
as Tax Assessor for the First
Taxation Division, Territory
of Hawaii,
Defendant-in-Error.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

ROBERTSON & CASTLE,
A. G. M. ROBERTSON,
FREAR, PROSSER, ANDERSON & MARX,
W. F. FREAR,
SMITH, WARREN, STANLEY & VITOUSEK,
L. J. WARREN,
HENRY HOLMES.

Attorneys for Plaintiff-in-Error.

Filed this.....day of....., 1923.

F. D. MONCKTON, Clerk.

By..... Deputy Clerk.

FILED

JUN 23 1923

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No. 3876

IN THE

**United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT**

**EWA PLANTATION COMPANY,
a Hawaiian Corporation,
Plaintiff-in-Error,**

vs.

**CHARLES T. WILDER, as Tax Assessor
for the First Taxation Division, Terri-
tory of Hawaii,
Defendant-in-Error.**

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

STATEMENT OF THE CASE.

This case originated in the Supreme Court of Hawaii in the form of a "submission without action" upon agreed facts, the procedure being authorized by Sections 2381-2384, Revised Laws of Hawaii, 1915, as amended by Act 82 of the Session Laws of 1921.

On February 28, 1921, Ewa Plantation Company (plaintiff-in-error) filed with the tax assessor, as required by law, its annual income tax return showing its net income for the calendar year 1920. The tax

assessor questioned the correctness of the return in certain respects and the resulting differences of opinion were submitted to the Supreme Court for determination as above stated. The differences of opinion related to four items in the company's return, viz.: (1) Item 19 of Schedule "A" of the return designated "Strike Claim Settlement, \$2,324,931.75" which the assessor increased to \$2,791,697.72, the agreed facts in connection therewith being set forth in the submission (Transcript of Record, pp. 2-6); (2) Item 2 in Schedule "B" of the return, designated "Interest on Mainland and Foreign Investments, \$52,442.23" which the company claimed to be an allowable deduction from its gross income, but which the assessor refused to allow, the agreed facts in connection therewith being set forth in the submission (Record, pp. 6-8); (3) Item 15 (c) in said Schedule "B" designated "Loss on Sale Sugar Factors Stock \$289,680.00"; and (4) Item 15 (d) in said schedule designated "Loss on Sale Miscellaneous Bonds, \$197,824.11" (Record, pp. 8-13). The questions relating to these last two items were decided in accordance with the contentions made on behalf of the company (Record, pp. 48-54) so that they are not involved in this proceeding. Judgment was entered in the court below in favor of the assessor and against the company as to said Item 19 in Schedule "A", and as to Item 2 in Schedule "B", the total amount of the judgment being \$20,768.28 (Record, pp. 64-66).

The opinion of the court below was included with its opinion in another case, Hawaiian Sugar Company vs. Charles T. Wilder, assessor, which was submitted at the same time as this case, but that case has not been brought to this court.

In that case there was involved a question as to the depreciation of a leasehold (Record, pp. 54-63) which was also the subject of an opinion by the court on a motion for a rehearing which is reported in 26 Haw. 356.

ERRORS RELIED ON.

The following errors have been assigned (Record, pp. 80, 81) and are now relied upon as reasons for the reversal of the judgment below, viz.:

1. That said Supreme Court erred in holding that the entire sum of \$2,791,697.72 received by Ewa Plantation Company from the Hawaiian Sugar Planters' Association in 1920, by way of compensation for losses incurred by reason of the laborers' strike on the Island of Oahu, should be accounted for by said company as taxable income received during the year 1920.
2. That said Supreme Court erred in not holding that said sum of \$2,791,697.72 should be apportioned and the respective parts thereof so apportioned taken into account for income taxation purposes when and as the crops to which such parts respectively ap-

pertained, viz., the crops of 1920, 1921 and 1922, shall have been sold and the net results ascertained with reference to each of said crops.

3. That said Supreme Court erred in holding that the doctrine of the maxim *mobilia sequuntur personam* has not been repudiated by judicial precedent in Hawaii with reference to taxation.

4. That said Supreme Court erred in not holding that even if said doctrine has not been so repudiated it should not be applied in this case under the circumstances set forth in paragraph 4 of the submission herein.

5. That said Supreme Court erred in holding that the case of Maguire vs. Trefry, 253 U. S. 12, is a controlling authority in the case at bar.

6. That said Supreme Court erred in holding that the sum of \$52,442.23 received by Ewa Plantation Company during the year 1920 as interest upon foreign investments, i. e., interest on the bonds and notes of mainland railroad and industrial corporations and upon deposits in mainland banks, was not legally deductible in ascertaining the taxable income of said company in its tax return for 1921.

7. That said Supreme Court erred in holding that said sum of \$52,442.23 constituted taxable income of said company.

8. That said Supreme Court erred in adjudging that the second sub-item under Item (19) of Schedule "A" of the income tax return of Ewa Plantation Company filed on February 28, 1921, relating

to the income of said company for the year 1920 returned at \$2,324,931.75 should be increased to \$2,791,697.72 and that the income taxes payable with reference to the said item be increased by the sum of \$18,670.60 over the amount shown by said company's said return.

9. That said Supreme Court erred in adjudging that the deduction claimed in Schedule "B" of the said income tax return of Ewa Plantation Company, viz., Item "(2) Interest on Mainland and Foreign Investments," should be disallowed and that the income taxes payable by said company with reference to the said item be increased by the sum of \$2,097.68 over the amount shown by said company's said return.

10. That said Supreme Court erred in rendering and entering judgment in favor of Charles T. Wilder, Tax Assessor for the First Taxation Division, Territory of Hawaii, to recover from Ewa Plantation Company the sum of \$20,768.28.

ARGUMENT.

The first point is as to the correctness of the opinion and judgment of the court below on the question of the strike claim settlement (Record, pp. 29-33). This point is covered by assignments of error 1, 2 and 10.

The agreed facts showed, in brief, that in January and February, 1920, the plantation laborers on the Island of Oahu, including those of Ewa Plantation Company, went out on strike, and it became neces-

sary, in order to carry on the plantation, to employ strike breakers and other laborers at large expense; that the Japanese strikers and their families were being maintained by the laborers of that nationality on the islands other than Oahu; that it was decided that the strike should be handled by the Hawaiian Sugar Planters' Association, the membership of which is composed of practically every sugar plantation and mill company in the Territory, the Association agreeing to underwrite the losses of the Oahu plantations, and that all the members should contribute to the expense; it was also agreed that the underwritten losses would be limited to those chargeable to the crops of 1920, 1921 and 1922, and to net losses to other property, such as damage to buildings, etc.; the expense of the strike to the Hawaiian Sugar Planters' Association amounted to \$635,959.42, and the losses of the plantation companies on Oahu aggregated the sum of \$11,483,357.88; each member of the Association contributed its pro rata of said expense and loss, the share contributed by Ewa Plantation Company amounting to \$721,818.95 and said company received from the Association in full settlement of its losses the sum of \$2,791,697.72; the last named sum was made up of the estimated losses on the three crops which were in the ground at the time of the strike, as follows: Crop of 1920, \$2,324,931.75; crop of 1921, \$133,706.29, and the crop of 1922, \$333,059.68; and the contention of the company was, and its tax return was made upon the theory, that the total sum received from the Associa-

tion should not be accounted for as received during the year 1920, but that it should be accounted for in the three years in accordance with the estimated losses on the respective crops of 1920, 1921 and 1922, in other words, that in its tax return for 1921, based on its income for the year 1920, it should account for and include as a receipt only the amount received in connection with the loss to the 1920 crop, to wit, the sum of \$2,324,931.75, and account for and include the amounts received in respect of the 1921 and 1922 crops, viz., \$133,706.29 and \$333,059.68 in the returns of the two following years.

That contention was opposed by counsel for the tax assessor, and the Supreme Court of Hawaii held that the sum received by the company was merely in liquidation of an estimated loss or damage sustained by the company because of the strike, that it could not be apportioned, and that as the whole sum was received in the year 1920 income tax thereon became due in the following year.

The provisions of the Hawaiian statutes which bear on this question are set forth in full in an appendix to this brief.

It may be well for the court to know that while, in these islands, a crop of cane is harvested every year, it takes more than a year, sometimes two years, for a crop to mature. On a large plantation, such as Ewa, there are always three crops in the ground, one newly planted, one about half grown, and one ready for harvesting. It usually takes from seven to ten months each year to harvest a crop of

sugar cane and manufacture sugar therefrom. This will explain why it was that the losses of Ewa Plantation included three crops.

The agreed facts show (Paragraph 3, Record, p. 5) that since 1906 it has been the practice of the sugar companies to make their income tax returns, so far as their income from the sale of sugar is concerned, upon what is called the crop basis, that is to say, instead of deducting from the gross income received during the year the total disbursements made during the same period in respect of all three crops, it has been the custom, so far as the sugar produced was concerned, to deduct the amount expended in the production and marketing of the crop harvested during that year from the proceeds of sale of such crop. The gross income from sugar has been returned on the basis of the current or mature crop, so that all of the receipts from the sale of the sugar of the crop of the taxation period are returned as the income of the taxation period, even though portions of such sugars were actually sold, and the proceeds received either before or after the taxation year, and, similarly, the deductible cost of producing the crop includes all the cost of producing it, notwithstanding that the greater part of that cost was incurred in the preceding two years.

The income tax statute actually requires the doing of that very thing. Section 1307 of the Revised Laws of Hawaii, 1915, provides that "In estimating the gains, profits and income of any person or corporation, there shall be included * * * the amount of

sales of all movable property, less the amount expended in the purchase or production of the same." And the income tax return follows the statute. Schedule "A" includes "(8) Sales of Movable Property" "(b) Sugar" and Schedule "B" includes "(5) Cost of Crop (including property taxes paid)."'

In other words when the business of a corporation consists in producing and selling movable property, such as sugar, the taxable income therefrom must be computed by deducting the cost of production from the amount of the sales. That means an accounting on the crop basis.

In the case of the Tax Assessor v. Laupahoehoe Sugar Co., 18 Haw. 206, it appears that the income tax law was amended in 1905 by changing the yearly taxation period so that it should be twelve months preceding January 1, instead of July 1, as theretofore, and one taxation period of six months between July 1, 1905, and January 1, 1906, was provided for. The taxpayers had made their returns on the crop basis, whereas the assessor claimed that the taxable income should be computed by deducting the amounts expended during the year in the production of the several growing crops from the receipts during the year, as had been the previous practice. The action of the tax-payers was sustained. The Court said (p. 208) :

"The returns of the taxpayers in these cases are in exact accordance with the statute. Even if, as claimed by the assessor, a portion of the cost of production was incurred prior to the six months' taxa-

tion period and has already been deducted from the income of the taxpayers during the preceding taxation periods, that does not take away the right of the taxpayers to make their returns and compute their incomes as the statute directs."

In the case of *In re Income Tax Appeal Cases* (*Honokaa Sugar Co.*), 18 Haw. 596, 599, the question was whether the sum of \$6,222.71 expended in 1906 for clearing new land, the crop upon which would be harvested in 1908, should be deducted as an expense incurred in 1906 or as part of the expense of producing the crop of 1908 and not deductible until the latter year. The Court, affirming the decision in the *Laupahoehoe Sugar Co.* case, held that although the expenditure was made in 1906, it would not be deductible until 1908. Thus the practice of accounting and making returns on the crop basis "in exact accordance with the statute" was thoroughly established and it has been followed ever since.

This case is just the converse of the case last above referred to. There, an expenditure had been made in 1906 which the court held, upon the authority of the *Laupahoehoe Sugar Co.* case could not be deducted till 1908, when the crop for the benefit of which the expense was incurred would be harvested and sold.

Those two cases lay down the principle that the amounts expended in producing a crop of sugar cane are to be deducted only in the year when the crop is harvested. Until a crop matures and is marketed, the profit thereon, if any, cannot be known. Here

certain moneys have been received in 1920 by way of compensation for extraordinary costs arising by reason of the strike and damage done to the whole of each of two crops (the crops of 1921 and 1922), neither of which would mature and be marketed until after the year 1920. Until each crop had matured and was marketed it could not be known whether there was profit or loss therefrom. It could not be known in the year 1920, therefore, whether the compensation moneys were merely a return of capital or partly a return of capital and partly profit. Upon the principle recognized in the Laupahoehoe Sugar Co. case and upon the authority of that decision, those moneys should not be included in the income tax returns until the crops to which they relate shall be harvested and sold. To hold otherwise would be to ignore the plain language of the statute, reverse the prior decisions of the court, and repudiate a uniform practice of fifteen years' standing.

If everything received in 1920 is to be included in the tax returns of income, the whole system of accounting on the crop basis would be upset and it would be to revert to the method pursued prior to the decision of the Laupahoehoe Sugar Co. case, which the Supreme Court of Hawaii held was wrong. Further, if moneys received in 1920 as compensation for extraordinary costs arising by reason of the strike and damage to the crops of 1921 and 1922 are to be accounted for as income received in 1920, then the amount of loss sustained through the labor strike during the year 1920 must be deducted, be-

cause Section 1308 of the Revised Laws of Hawaii, 1915, as amended by Act 157 Session Laws of 1917, provides that “* * * all losses actually sustained during the taxation period next preceding * * *” shall be deducted.

The practice of determining taxable profits upon the crop basis not only complies with the requirements of the statute, but conforms to accepted accounting principles and is in force in the case of the Federal income tax. An operation by which an asset is acquired or produced does not necessarily result in either profit or loss. It depends upon whether the amount realized upon the sale differs from the cost of acquiring or producing the asset disposed of. If amounts expended in material and labor result in producing a crop of sugar cane, the profit or loss would be the difference between the aggregate amount expended and the amount received for the crop. But until the crop is sold it is impossible to ascertain the profit and taxable income, if any. And so money received on account of compensation for loss sustained on a crop which has not yet been harvested and sold constitutes merely a return or restoration of capital, and hence cannot be considered for income tax purposes until the crop shall have been sold, when it is included in the account and the profit on the crop can be ascertained.

It was impossible to tell in January, 1921, that is, at the time the tax return was required to be filed, what amount would be expended in producing and marketing the crop to be harvested in that year, the

damage to which had been done in 1920. It was not a case of total destruction. The damaged crop was there to be harvested and sold. If the estimation and payment of the amount of damage had been postponed until the crop had been harvested and sold the exact profit or loss could be ascertained and no question would have arisen. But the money representing the estimated loss could just as well be held by the Ewa Plantation Company in abeyance, or in "suspense," as it could have been held for the time being by the Hawaiian Sugar Planters' Association. The transfer of the money by the latter to the company in 1920 did not alter its character or status so as to turn it into a taxable profit of the company in the year 1920. Of course if the 1921 and 1922 crops when harvested and sold without including the compensation had resulted in a profit, the whole of the compensation would be a profit but until the crops were harvested and sold it could not be determined whether or not the compensation or any part of it was a profit.

The money received from the Planters' Association was largely in the nature of reimbursement to the company for extraordinary expenditures incurred in carrying on the plantation and saving the crops by the employment of strike breakers and others. In other words, it was in partial reduction of the cost of keeping the crops alive and assisting them to maturity. But the total actual cost of the crops could not be ascertained, as above pointed out, till they respectively should be harvested and sold.

Referring to the two Hawaiian cases above cited, the Supreme Court of Hawaii said:

"In each of these cases it was held that moneys expended prior to the taxation period in the production of sugar were deductible, not in the period in which the expenditure was made, but at the time the crop was sold. These decisions we think are in accord with the provisions of the statute. In the present case, however, we are confronted with a different set of facts. It must be borne in mind that we are now dealing with a receipt and not an expenditure. * * * Whether this estimate proves to be even approximately correct will necessarily depend upon many contingencies, but irrespective of that feature it is plain to us that the company has not the power merely by an arrangement with the Hawaiian Sugar Planters' Association, or for the sake of harmony in its accounting system or otherwise, to convert a sum received by it as compensation for damages caused by the laborers' strike into an amount expended in the purchase or production of specific growing crops of sugar cane." (Record, p. 32.)

And it should have been equally plain that the tax assessor had not the power "to convert a sum received * * * as compensation for damages caused by the laborers' strike" wholly into a profit upon which the taxpayer should pay income tax. The company had made no attempt to convert the sum it received from the Planters' Association, or any part thereof, into an amount expended in the "purchase or production of specific growing crops of sugar cane." But it did consider that the amounts expended "in the * * * production of specific growing crops of sugar cane" had some place in an income tax account

which charged the tax payer with the compensation received for partial loss of these crops as profit. The compensation awarded had to come into the account either as a part of the proceeds received for, or as a reduction of the expense incurred by it in the production of, the respective crops. Strictly speaking, the money received must be regarded as capital, not income such as profit, until the crop is harvested and the sugar sold, when the profit, if any, can be determined. Neither was the theory upon which the company made its return in 1921 based upon an arrangement with the Planters' Association. The company intended and attempted to make its return for taxation in "exact accordance with the statute" (to use the words of the Court in 18 Haw. 206), consistently with the practice thereunder and in harmony with the decisions of the Supreme Court in which the statute had been interpreted. In order that the crop system of accounting be accurate, it must be consistently carried out, and the reason for deferring charges against a crop apply equally and logically to credits.

Let us attempt to explain the difficulty in the case: the explanation offered is simple, but we believe it to be complete.

It is stated in the syllabus of the court below:

"Where a sum is received by the taxpayers in liquidation of losses or damage sustained because of a laborers' strike income tax *thereon* should be paid for the year in which the payment is made." (Record, p. 26), and in the decision at page 304:

"but neither the sum involved here nor any part thereof was expended in the purchase or production of movable property and hence *the whole amount thereof is included within 'other * * * income * * ** derived from any source whatsoever during said taxation period." (Record, p. 33).

The court clearly held that a sum "received * * * in liquidation of losses or damage sustained" is income *of the nature of profits* "and hence the whole amount thereof" is liable for income tax. But surely "a sum received * * * in liquidation of losses or damage sustained" is not income of the nature of profit.

That this is so is clearly shown by Section 1308 of the Revised Laws of Hawaii, 1915, as amended by Act 157, Laws 1917, which give the taxpayer the right to deduct from his income (profits) losses (not compensated by insurance).

The court seems to have proceeded on the theory that where a loss is compensated by insurance, (the loss shall not only not be deducted from the profits, but) the taxpayer shall pay income taxes on the "whole" amount of compensation received by it, as if it were all profit, which is preposterous. The court construed the word "income" as including everything that comes in and therefore concluded that as a receipt is something that comes in, a receipt is income. The word "income" in an income tax law means income of the nature of profit, rents and interest compared to the fruit of a tree, as distinguished from capital, likened to the tree itself.

The definition adopted by the Supreme Court in *Eisner v. Macomber*, 252, U. S. 189, at page 207, was:

“ ‘Income may be defined as a *gain* derived from capital, from labor, or from both combined’, provided it be understood to include profit gained through a sale or conversion of capital assets to which it was applied in the Doyle Case (pp. 183, 185)” and on page 206 are given illustrations.

What in this case was lost was a part of a crop of sugar cane. The value of the growing crop of sugar cane would usually be in excess of its cost and that excess would represent the profit on the crop, the amount of which would be determined and could only be determined when the crop was harvested and the sugar sold.

Where there was partial loss of a crop, as in this case, the profit, if any, could only be ascertained in this manner. The crop would be harvested and the sugar sold and to the credit side of the account would be added the amount of compensation awarded in respect of the crop and the final balance to the credit of the account would represent the profit upon which income tax would be payable.

As the compensation for the loss on the 1921 and 1922 crops was received, it would be credited to the respective crop and to that extent would reduce the cost of it without affecting the net result.

“Having regard to the very truth of the matter, to substance and not to form,” to use the words of the court in *Eisner v. Macomber*, supra, at page 211, it matters not whether the compensation is treated as

part of the receipts or a credit in the account which reduces the cost because the result is the same.

It will thus be seen why the amount of compensation for partial loss of the crops of the years 1921 and 1922 must be assigned to or included in the years in which these crops are harvested and the sugar sold, because unless and until this is done, it is impossible to say what the profit on these crops was.

The case is somewhat analogous to the case of the loss of a ship's freight (in the sense of earnings) compensated by insurance. From the compensation received for loss of freight the shipowner would have to deduct the cost of operating the vessel and the balance, if any, would be income subject to tax. The whole amount received as compensation for loss of freight would not be "net profit or income above actual operating and business expenses" (under Section 1306 Revised Laws of Hawaii 1915) nor "gains, profits and income" (under Section 1307).

Counsel for the tax assessor also referred in the court below to the fact that the amount contributed by the Ewa Company to the Planters' Association had been claimed and allowed as a deduction in the year 1920, claiming that that fact showed that the entire amount received by the company should be accounted for as income for that year. It seems to us, however, that the payment of the assessment and the receipt of the compensation were two separate and distinct things. The assessment was *paid* in a lump sum, while the compensation was carefully

estimated upon and apportioned between the different crops in consideration of the damage done to each. It was not money expended in the production of the crops, but was an expense of the nature of premium for insurance against loss arising through the laborers' strike, properly deductible under Section 1308, Revised Laws of Hawaii, 1915, as amended by Act 157 of the Session Laws of 1917, and would have been payable if no loss had been sustained through the strike and no compensation received. As to the plantation companies on the islands other than Oahu who paid like assessments, the payments were certainly deductible in the year in which they were made, and the fact that the Ewa Company was one of the companies which received compensation does not alter the situation as to it with reference to the payment of the assessment.

The principles herein advocated are recognized by the Federal tax officials under the Federal income tax laws, not only in their practice of accepting tax returns from the Hawaiian sugar plantations made out on the crop basis, but also in the regulations. For instance, Article 38 of Regulations 45 provides, among other things, as follows:

"If a farmer is engaged in producing crops which take more than a year from the time of planting to the time of gathering and disposing, the income therefrom may be computed upon the crop basis; but in any such cases the entire cost of producing the crop must be taken as a deduction in the year in which the gross income from the crop is realized."

And Article 110 of the same Regulations provides somewhat similarly, among other things, as follows:

"Where a farmer is engaged in producing crops which take more than a year from the time of planting to the process of gathering and disposal, expenses deducted may be determined upon the crop basis, and such deductions must be taken in the year in which the gross income from the crop has been realized."

These rulings are continued in the present regulations (Arts. 38 and 110, Reg. 62).

Consistency is further and more explicitly provided for in Art. 23, Reg. 62, as follows:

"Approved standard methods of accounting will ordinarily be regarded as clearly reflecting income. A method of accounting will not, however, be regarded as clearly reflecting income, unless all items of gross income and all deductions are treated with reasonable consistency."

Thus the Bureau of Internal Revenue recognizes that items of crop income and crop cost should be carried over until the crop is harvested and disposed of, that is, until it is possible to determine the gain from it.

The total amount received by the company represented the damage or loss suffered by it with reference to the three specified crops. The amount received on account of each crop was definitely known inasmuch as the basis for the payment received was the estimated damage to each crop. The amounts received were, therefore, definitely attributable to

the 1920, 1921 and 1922 crops and should be accounted for on the crop basis. In so far as such receipts represented reimbursements for extra crop expenses incurred or to be incurred, the amount received should be treated as an offset to such crop expense and should therefore be accounted for on the same basis and in the same period. In so far as such receipts represented reimbursements for decreased yields, the amounts received might be regarded as advance payments on account of the respective particular crops and should likewise be accounted for on the same basis and in the same period as the expenses attributable to the crops. In so far as it might be contended by the tax assessor that the payments were compensation for damages sustained in 1920 to all three crops it would seem that, if the payments must be returned in that year, corresponding deductions for losses sustained for the same year should be allowed which would offset the credit to income. In other words, if the portions of the indemnity which applied to the 1921 and 1922 crops covered losses sustained on those crops during the year 1920, there would be no taxable profit in respect of these portions because if the indemnity payments received were included in the gross income it would necessarily follow that the losses sustained, which were identical in amount, should be included within the deductions. By attempting to include the 1921 and 1922 crop indemnities in the 1920 income the tax assessor would collect taxes on that much gross income without the company receiving the benefit of

the proper deductions. In a sense the payments were payments by the Planters' Association, through the company, of the extra or additional expenses to which the company was and would be subjected in respect of these crops by reason of the strike and thus diminished the total expense to the company of these crops, so that the payments should be regarded not so much as a source of income to the company as a sharing of the expense by the Association. In a somewhat similar sense the payments might be regarded as in the nature of insurance paid for the losses incurred. After the incurrence of the losses and the receipt of the indemnities the company would stand just where it did before. A cross entry of loss and gain would result the same as no entry at all.

Perhaps a more accurate way of handling the accounts would have been to credit each of the expense accounts with the portion of the indemnity applicable to it, but this would have necessitated a very large number of journal entries and the final result would have been the same. Hence it was deemed better to carry the amounts applicable to the 1921 and 1922 crops in "suspense" until those crops should be harvested and marketed respectively and then to transfer the proper amounts to profit and loss direct.

The principle is that the accounts are kept and the tax returns are made so far as income from the sale of sugar is concerned on a crop basis and that all items, whether receipts or disbursements, which are

definitely referable to a particular crop, should be accounted for on that basis.

We submit that the plaintiff-in-error has the right to insist, and it is all that it is asking with reference to this branch of the case, that the system of accounting upon the crop basis should be consistently applied in this case.

INTEREST ON MAINLAND INVESTMENTS.

The second point is as to the correctness of the opinion and judgment of the court below on the question as to whether interest received by the plaintiff-in-error during the year 1920 on the bonds and notes of mainland railroad and industrial corporations and upon deposits in mainland banks was or was not legally deductible in its tax return of 1921 in ascertaining its taxable income. (Record, pp. 33-48). This point is covered by errors assigned and numbered 3-7, 9 and 10. (Record, pp. 80, 81).

The agreed facts showed:

That ever since the incorporation of Ewa Plantation Company, Castle & Cooke, Limited, a Hawaiian corporation, has been its general agent at Honolulu, and for upwards of twenty years last past Welch & Company, a California corporation, has been the agent at San Francisco of said Castle & Cooke, Limited; that at all times during said period the sugar produced by the Ewa Plantation Company has been sold on the mainland of the United States and the proceeds of sale have been received by Welch & Com-

pany and deposited by it in California banks, and credited on its books to Castle & Cooke, Limited, for account of Ewa Plantation Company; that against said credit the Ewa Plantation Company has drawn, from time to time as needed, moneys required by it for the payment of expenses of its plantation and dividends upon its stock; that bonds and notes of foreign (mainland) railroad and industrial corporations were purchased by Welch & Company with the surplus moneys of the Ewa Plantation Company so held as aforesaid by the former Company and the said bonds and notes thereafter, until they were sold on the mainland, remained on deposit with said Welch & Company and none of said bonds and notes, or the proceeds with which they were purchased, have been held in said Territory, nor have they been physically present therein at any time;

That the Ewa Plantation Company after including it in Schedule A of its return deducted the interest accruing to it from these investments during the year 1920 in its Territorial income tax return of 1921, by including it in Schedule B (Record, pp. 16, 18), and that the Territory, acting through its tax assessor, disallowed such deduction; and

That at no time heretofore has the Territory considered income derived from such investments as taxable income or included such in assessing the incomes of corporations or individuals under the laws of the Territory. The issue raised is: Is interest accruing from such bonds, notes and bank deposits

properly deductible prior to arriving at taxable net income under the Territorial Income Tax Act?

A. The Territorial Income Tax Act has been in force since July 1, 1901. It was originally Act 20 of the Session Laws of 1901. It was incorporated in the Revised Laws of 1905 as Chapter 99 and is now Chapter 94 of the Revised Laws of 1915, minor amendments (e. g. as to amount of exemption and the taxation period), which have no bearing on the present question, were made in 1905 and 1909. Prior to 1901 Hawaii had an income tax law—Act 65, Session Laws of 1896—in which identically the same language was used in Sections 1 and 2 thereof to define the income subject to taxation; this act was however declared unconstitutional in 1897, (*Campbell v. Shaw*, 11 Haw. 112.)

By all these acts the taxable income of corporations is and was specifically limited to that derived from "property owned and every business, trade, employment or vocation carried on in the Territory," and in this respect corporations, foreign and domestic, were placed on the same plane as resident and non-resident individuals.

Section 1306 of said Chapter 94 (Sec. 2, Act 20, Session Laws of 1901) provides that in the case of corporations income tax shall be levied:

"On the net profit or income above actual operating and business expenses derived * * * from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in

the Territory, no matter where created and organized."

and Section 1305 of Chapter 94 (Sec. 1, Act 20, Session Laws 1901) provides that in the case of *individuals* income tax shall be levied:

"Upon the gains, profits and income over and above Fifteen Hundred Dollars derived by *every person* residing in the Territory of Hawaii, from all property owned, and every business, trade, profession, employment or vocation, carried on in the Territory, and by *every person residing without* the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory."

The Act thus makes the rule in the Territory the same both as to persons, whether resident or non-resident, and as to corporations, whether domestic or foreign; the taxable income is only that part which is derived "from property owned or business, etc., carried on in the Territory." This is exceptional. As a general rule income tax laws impose the tax upon income of residents (whether individuals or corporations, citizens or aliens) *from whatever source derived* whether from within or without the taxing jurisdiction, but only upon that part of the income of non-residents (at least unless they are citizens) which is derived from sources within the jurisdiction. Such is the case under the Federal Income Tax Act of 1918 and prior statutes, under English statutes, and under the laws of most of the States which tax income. (Black on Income

Taxes, 2nd Ed., Chapter 9, Section 252). Some States, as for instance, Wisconsin, (see appendix Black pages 643 et seq) make a distinction between foreign investments and foreign business in this respect, by including in the taxable income of residents from foreign sources only that received from foreign investments, and excluding that received from foreign business. The Territory goes still further in this direction by excluding from the taxable income of residents not only income from foreign business, but also, we claim, income from foreign investments. Black, (pp. 351, 352) regarding such income in Hawaii as non-taxable, speaks of this exclusion as being exceptional, using the following language:

"It is also within the competence of the several States to tax their resident citizens upon intangible personal property, consisting, for example, of shares of stock in foreign corporations, and no constitutional provision is thereby violated. Naturally, therefore, they also have the power to tax income derived from such sources and this has generally been provided for in the income tax laws of the States. In Hawaii, it is true, the taxes are levied on 'income derived by every person residing in the Territory of Hawaii from all property owned, and all business, trade, profession, employment or vocation carried on in the Territory.' *But this is exceptional.*"

B. The income in question was not received "from any business, trade, employment or vocation carried on in Hawaii and therefore the statute (R. L. Sec. 1306) may be regarded as though it read: "There

shall be levied a tax on the income from all property owned in Hawaii." The question then briefly stated is, are the bonds, notes and bank deposits referred to in the Submission "property owned in Hawaii?" There is no doubt that they are property belonging to plaintiff-in-error. The expression "owned in" is frequently used in either one of two senses, either as referring to the fact that the *owner* is in the place mentioned or as referring to the fact that the *property* owned is in the place mentioned. R. L., 1915, Sec. 1305, contains a provision similar to that of Sec. 1306, but with reference to the income of *persons*, and taxes the income of persons in Hawaii as well as those residing without the Territory, describing in both instances, in identically the same language as above quoted, the property from which the income is derived. This we claim clearly indicates that the expression "owned" was not used in Section 1305 in the sense of the *owner* being in Hawaii because that Section recognizes that non-residents also can own property *in* Hawaii. The same meaning must be given to the expression "owned in" when used in Section 1306, and it must be taken as referring to the property and not to the owner; and the final form of the question is, are these bonds, notes and bank deposits "*property in Hawaii?*" It was conceded in the court below by the defendant-in-error that the case stands as though the statute read: "Income from property in Hawaii owned by the tax-payer." (See Record, pp. 37, 38.) The court below expressed itself as not being as ready as counsel for

the Territory to accept this construction of the meaning of the statute and stated that it could be strongly argued that the expression "property owned in Hawaii" has reference to the place of ownership and not to the location of the property. It said (Record, p. 38) that while it might be true that if a person were asked "What property do you own in the Territory" he would not in answer enumerate bonds and notes of foreign or mainland corporations or deposits in foreign or mainland banks; on the other hand, if the San Francisco agents were asked in reference to the property in question, "Where are these bonds, notes or bank credits owned," the answer obviously would be "In the Territory of Hawaii," and that answer would be entirely correct. The court below overlooked the fact that if the expression has reference to the place of ownership and not to the location of the property the income of non-residents would escape taxation in Hawaii, the place of ownership in such cases being elsewhere than in Hawaii; the income of the property of a non-resident could in no case be taxed, while that of a resident would never be exempt in whatever part of the world it might be situated.

The fact, also that by Sec. 1306, supra, corporations, domestic and foreign—"corporations * * * *no matter where created and organized*"—are placed for income taxation purposes on the same plane seems to us conclusive upon the question that the statute subjects to taxation the income of property actually situated in Hawaii and not the income of

property the ownership of which was in Hawaii, for if the latter were the meaning of the language used in the statute the income of property in Hawaii owned by a foreign corporation would escape taxation.

That the income of non-residents and foreign corporations derived from property in the Territory should be exempt from taxation was not the intention of the legislature. Its intent gathered from the ordinary meaning of the language it used in reference to all classes, was to tax income derived from all property and business in the Territory, whether such property or business was owned or carried on by corporations or individuals, resident or non-resident.

The power of the legislature as to non-residents extended no further than the taxation of the income of property actually within the Territory.

Gray's Limitation of Taxing Power and Public Indebtedness, Sec. 71;

Dewey vs. De Moines, 173 U. S. 193.

It is conceded by the plaintiff-in-error that the legislative power in respect to the taxation of residents (individuals and corporations) is absolute and unlimited, (Gray, (supra) Sect. 44) and that the Legislature could, by the use of appropriate language, exercise this power so as to subject to taxation income derived from all sources whether within or without the Territory. What the plaintiff-in-error claims is that the language used by the Legislature of Hawaii shows that it did not intend to exercise

to its fullest extent the power it possessed in the case of corporations and residents, but limited and confined the exercise of that power to the taxation only of income derived from property within the Territory.

The extent of its powers,—limited as to non-residents, unlimited as to residents,—must be presumed to have been known by the legislature. Knowing its powers, it must be presumed from its use of the same language in describing the taxable income of corporations, residents and non-residents to have intended that the meaning of the language used should be the same whenever used:

Rhodes vs. Weldy, 45 Ohio St., 242; 15 Am. St., Rep. 584, 591-592;
Endlich, Interpretation of Stats. Secs. 382, 387; 26 Am. & Eng. Ency of Law, p. 610.

and that, whatever the property was the income of which it proposed to tax, all should be on the same basis, namely: the income from all property and business actually within the Territory should be taxed wherever the owner might reside.

It being incontrovertible that the only income of non-residents which could be taxed is that derived from property or business actually situated or conducted within the Territory, it follows that the legislative definition of taxable income must refer when used in respect to residents (individuals or corporations) to the actual situs of the property or the business. If the intention had been different it cannot be doubted that different language would have been

used. It would have been so easy and so natural to have declared that income from all property, wherever situated, owned by individuals or corporations, was taxable, that such a declaration would undoubtedly have been made in the statute if that had been the intent of the legislature.

In De Ganay v. Lederer, 239 Fed. 571 (referred to at length hereafter) where the court held that language almost identical with that of the Hawaiian statute referred to the *physical location* and not the *ownership* of property, the court said:

"When we find words which have a well known and universal use, and which, if so read, express a meaning which Congress at least may have intended, we are justified in assuming that they were so used, and not justified in giving them a strange and before unheard of meaning, in order to force a construction which, if that meaning was in fact intended by Congress, might have been expressed in other and apt words."

C. Comparison with other legislation: When other states have undertaken to tax income from property outside their Territorial limits, they have done so by appropriate language. Thus, in South Carolina, the taxable income of residents is that received from certain enumerated kinds of property, and "from any other source whatever," while the words used to describe the taxable income of non-residents are identical with those used as to all classes in the Hawaiian statute. In North Carolina, the statute includes income from "any and all

sources." In Virginia the language of the statute is "all rents, * * * interest upon notes, bonds, or other evidences of debt, of whatever description of the United States, or any state or county, or any corporation * * * and all other gains and profits derived from any source whatever." In Winconsin residents are taxed upon "all income * * * derived from sources within or without the State," while non-residents are taxable only in respect to income "derived from property within the State or within its jurisdiction." (Black, *supra*, pp. 643 et seq.)

Under the Federal Income Tax Act of 1918, Section 212, persons residing within the United States are taxed upon the "income derived from any source whatever," non-residents under Section 213 being taxed only in respect of "income from sources within the United States." The same distinction is made in the earlier Federal Acts. It must be assumed that the Legislature of Hawaii, before passing the Income Tax Act of 1896, had made a study of similar legislation in other countries. Black, *supra*, Section 194, page 230, says that: "A comprehensive statute, modelled on the various acts of Congress, was passed by the Territory of Hawaii in 1901." The earlier Act of 1896 had evidently escaped the author's attention. The actual facts are thus stated by the Supreme Court of Hawaii in *Robertson vs. Pratt*, 13 Haw. 590, at 591:

"The statute" (that of 1901 now in question) "was taken largely from that of 1896, which was taken largely from that passed by Congress in 1894, which

in turn was taken largely from those passed by Congress during the years 1861-1870."

That case held the Act constitutional, as did also the Circuit Court of Appeals for the Ninth Circuit in W. C. Peacock v. Pratt, 121 Fed. 772. The Act of 1896 having been framed after a study of the acts of Congress, it is of interest to note the language of the Federal Act of 1894. Under that Act citizens and residents were taxed upon the income derived "from any kind of property, rents, interest, dividends * * * or from any profession, trade, * * * carried on in the United States or elsewhere, or from any other source whatever," while non-residents were taxed only upon "income from all property owned and of every business, trade and/or profession carried on in the United States."

The fact that, with this act before it, the Legislature of Hawaii in 1896 and all subsequent legislation, rejected the all-embracing description of income taxable to residents and adopted in identical language only that applicable to non-residents, would seem to us conclusive upon the proposition that the intention of the Legislature of Hawaii was to limit the exercise of its power of taxation to the income of property actually within its territorial limits.

D. Mobilia sequuntur personam. It being conceded (Record, pp. 37, 38) that the case stands as though the statute read "income from property in Hawaii owned by the taxpayer," and that the bonds, notes and deposits in question have never been physically present in the Territory, the income therefrom

can be taxable only if, by the introduction of the legal fiction *mobilia sequuntur personam*, they can be said to have a situs in Hawaii.

1. It is an elementary rule of statutory construction (embodied in Hawaiian law as Section 9, Revised Laws of Hawaii, 1915) that:

"The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning."

The popular and general meaning of the language of the statute leaves no room for the introduction of any legal fiction; the legislature was not enunciating any such fiction, but in speaking of property within the Territory was speaking in plain words and to the plain understanding of men in general. The person of ordinary understanding certainly would interpret the language as meaning property actually in Hawaii, and would not understand it to include also property which, while not physically in Hawaii, was given a situs there by virtue of a legal fiction.

2. A rule of construction of taxation statutes is:

A statute imposing taxes is to be strictly construed against the government and in favor of the taxpayer; that no person and no property is to be included within its scope unless explicitly placed there by the clear language of the statute, and no heavier burdens imposed than the plain meaning of

its terms will warrant; that the intention of the taxing power must be expressed in clear and unambiguous language and that any fair doubt as to the construction of an act imposing taxation should be resolved in favor of those upon whom the burden is sought to be laid.

See *Black* (*supra*) Sec. 217;
Gould v. Gould, 245 U. S. 151, followed in *Hai-ku Sugar Co. v. Johnstone*, 249 Fed. 103, 109 (Ninth Circuit), and in
Frear v. Wilder, 25 Haw. 603, 607;
U. S. v. Goldenberg, 168 U. S. 95, 102, 103;
Eidman v. Martinez, 184 U. S. 578;
U. S. v. Isham, 17 Wall. 496, 504;
Benziger v. U. S., 192 U. S., 38, 55;
Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 416;
Parkview Bldg. & Loan Assn. v. Herold, 203 Fed. 896;

See also *Penn. Steel Co. v. New York City*, 198 Fed. 774, where in construing the federal corporation tax law of 1909 the court said:

“This statute levying as it does a tax upon the citizen, must be strictly construed; it can’t be enlarged by construction to cover matters not clearly within its import. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained, the duty of the court is accomplished.”

Applying these principles to the question in issue, we submit that if in the income tax statute there is

any ambiguity as to what the legislature intended should be covered by the language "property owned in the Territory"—as to whether it covered not only property actually in Hawaii, but also property which under a legal fiction might have a situs there, or as to whether any particular fund or kind or class of gain or acquisition constitutes taxable income within the meaning of the law—then the substantial and reasonable doubt arising must be resolved in favor of the taxpayer and not in favor of the government.

There are two other rules of statutory construction that should be applied in ascertaining the intention of the Legislature.

(a) Statutes in *pari materia* are to be read and construed together.

Under this rule of construction there should be considered, in connection with the income tax act, Sec. 6 of Chapter 3, R. L. 1915, entitled "Operation of Laws" and reading as follows:

"The laws are obligatory upon all persons, and all persons are subject thereto, whether citizens of this Territory or citizens or subjects of any foreign state * * * while within the limits of this Territory * * *. The property of all such persons, while such property is within the territorial jurisdiction of this Territory, is also subject to the laws."

The term "territorial jurisdiction" has reference to actual boundaries and locality. Thus "a tract of land or district within which a judge or magistrate has jurisdiction is called his territory and his power

in relation to his territory is called his territorial jurisdiction."

Words and Phrases, Vol. 8, page 6925.

Robinson vs. City of Norfolk, 60 S. E. 762.

Taking these two statutes together, the expression "property owned in the Territory" used in the income tax act, must mean property actually located within the territorial limits of the Territory.

(b) Contemporaneous Construction. What the intention of the Legislature appeared to be to the executive branch of the government of the Territory is shown also by the construction put upon the act by those charged with the duty of administering and applying it. Income tax legislation has been in force in Hawaii for a period of over twenty-one years. Throughout this period the language defining what is taxable income has always remained the same, and the agreed facts (Record, p. 8) show that at no time heretofore has the assessor or any of his predecessors considered income derived from investments such as are now under consideration, taxable income or included such in assessing the income of corporations or individuals.

The construction therefore placed upon the acts by the administrative officers for over twenty-one years has been that the language of the legislature did not extend to or cover such income, and that the legislature did not intend that the same should be taxable.

To the effect that this practical construction is entitled to great weight and the most respectful con-

sideration, and should not be overruled without cogent reasons, see

Black (*supra*) Sec. 220;

U. S. v. Recorder, 1 Blatchf. 218; Fed. Cas. No. 16129;

Shell's Executors v. Fauche, 138 U. S. 572;

Heath v. Wallace, 138 U. S. 582;

Pennoyer vs. McConaughy, 140 U. S. 23, in which case it was held that:

"The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction by the courts, is so firmly embedded in our jurisprudence that no authorities need be cited to support it."

The principle is thoroughly established in Hawaii as to tax statutes as well as other statutes.

County of Hawaii v. Auditor, 25 Haw. 372, at p. 377.

E. The common law maxim *mobilia sequuntur personam* has, in its application to taxation matters, never been recognized or adopted as law in Hawaii.

In 1892 the common law of England as ascertained by English and American decisions was by statute (C. 57 Session Laws of 1892, Sec. 5; now Sec. 1, R. L. 1915) declared to be the common law of Hawaii "except as provided * * * or fixed by Hawaiian judicial precedent"; this statute went into effect on January 1, 1893.

The maxim above referred to did not in 1893 become part of the law of Hawaii for the reason that,

as will presently appear, that part of the common law had previously been rejected by the courts of Hawaii.

Prior to that year the courts were by various statutes authorized to decide causes according to reason and equity, and to adopt the principles of the common law when and only insofar as they considered them founded in justice and not contrary to Hawaiian law and usage. See Section IV, p. 5, Laws of 1847 and Sections 14, C. 3 and 823, C. 12, Civil Code 1859, reading as follows:

"The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the supreme court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided always, that the legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and decisions, in analagous cases afterwards to arise before said courts, or any of them."

Section 14 Civil Code 1859: "The judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to receive usage, and resort may also be had to the laws and usages of other countries."

Section 823 Civil Code 1859: "The several courts may cite and adopt the reasonings and principles of the admiralty, maritime, and common law of other countries, and also of the Roman or civil law, *so far as the same may be founded in justice*, and not in conflict with the laws and customs of this kingdom."

While the courts usually followed the common law of England, they rejected it in many important particulars. Some of the principal cases in which the common law was rejected are the following: *Wood v. Ladd* (1847), 1 Haw. 23, holding a seal not essential to mortgage; *Campbell v. Manu* (1882), 4 Haw. 459, holding seal not essential to deed; In *Re F. R. Vida* (1852), 1 Haw. 107, holding widow entitled to dower in leasehold estate; *Awa v. Horner* (1886), 5 Haw. 543, holding conveyance to two or more creates tenancy in common, not joint tenancy; *Kake v. Horton* (1860), 2 Haw. 209, holding action maintainable for damages for death by wrongful act; *Thurston v. Allen* (1891), 8 Haw. 392, holding rule in Shelley's Case not law in Hawaii. In the case last cited the Court said (pp. 398, 399) :

"We and our predecessors on this bench have felt free to examine into the reasoning of every principle of the common law as it has been presented to us for adoption from time to time * * * when we have followed and adopted the common law, we have felt that its reasoning was sound and just and its principles adapted to our circumstances. When we have felt otherwise we have not hesitated to reject it * * *. They (the precedents and principles laid down by the courts of those countries where the common law prevails) are not absolutely authoritative, and until

further restrained by statute, we shall continue to rejoice in our freedom."

Being thus at liberty to adopt or reject the maxim *mobilia sequuntur personam*, the Supreme Court of Hawaii in the year 1871 in the case of Hackfeld & Co. v. Minister of Finance, 3 Haw. 292, and later in 1879, in the case of Hackfeld & Co. v. Luce, Tax Collector, 4 Haw. 172, rejected it, and emphatically declared: That it was not the law in Hawaii; that the advantage resulting from taxation legitimately belongs only to the government giving protection to property; that in the adjustment of systems of taxation it has been very generally rejected elsewhere on the ground that it was productive of unjust consequences, and that the legal fiction could not become law except by legislative enactment.

In *Hackfeld & Co. v. Minister of Finance*, 3 Haw. 292, the Court said (p. 294) :

"The question for our decision is, whether the laws of this Kingdom authorize the assessment of taxes on personal property situated in a foreign country, although the owner resides here."

In that case the property sought to be taxed belonged to the plaintiff, a domestic partnership, and consisted of both tangible and intangible personality—"money and goods"—at the time of assessment in Europe and the United States, included therein being consignments of merchandise in San Francisco and elsewhere in the United States. The statute under which the question arose defined personal

property as "all personal property of whatever kind * * * and every species of property not included in real estate." The assessment could be sustained only by invoking the doctrine of the maxim *mobilia sequuntur personam*. The court held that no portion of the property was taxable, criticising the maxim as a legal *fiction*, and declaring that it could not become *fact*, as applicable to taxation, except by legislative enactment. The repudiation of the maxim was complete; if it had been adopted the money and goods in question could have had no other situs than Hawaii, where the owner resided, and would therefore have been taxable.

The language of the court is in part as follows:

"It is said personal property, by a fiction of law, has no situs, except with the owner. It is always supposed to be with him, wherever he may reside.

"Mr. Justice Story, Conflict of Laws, Sec. 550, says that a nation, in whose territory any personal property is actually situated, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has on immovable property situated therein.

"Property should pay taxes to the government which protects it, and the *legal fiction* which makes the *situs of personal property wherever the owner is*, with all the unjust consequences which would follow, cannot become a fact, as applicable to taxation, except by legislative enactment."

The court cited with approval the highly instructive case of Hoyt v. the Commissioner of Taxes, (1861) 23 New York Reports, 224, in which it is said (p. 228) "There seems to be no place for the fiction of which we are speaking in a well ordered system of taxation," and then continued:

"Upon principle, it is the legitimate right of the government which gives *protection to property*, to have the advantage resulting from taxation.

"There is no more reason why this property should be taxed here, than the property situated here should be taxed at the residence of the senior partner in Europe. *To impose a tax upon property thus situated, requires a legislative enactment, distinct and clear in its terms.*"

Hartwell J., in a concurring opinion quoted in support of the decision Section 6 of the Civil Code of 1859 which limits the effect and operation of laws to property "within the territorial jurisdiction of this Kingdom." This section is still in force as Section 6, Chapter 3, R. L. 1915.

In Hoyt v. Commissioner of Taxes (*supra*) decided in 1861, the decision was expressly limited to the case of visible and tangible property, the court saying however that "it may be that capital thus situated" (invested abroad) "should be regarded as foreign and not domestic in the absence of any special statutory provision in that regard." Later, in the case of People v. Gardner, 51 Barb. (N. Y.) (1868) 353, it was held that the maxim was equally inapplicable to *intangible* property, and this case, as will hereafter appear, was in great measure the basis of the decision in Hackfeld & Co. v. Luce, Tax Collector, 4 Haw. 172.

In People v. Gardner, great stress was laid by counsel for the assessor upon the word "owned" in the expression "owned in the State," used in the statute, but it was held "that the fact that property

was owned by the relator was not alone sufficient to justify the action of the assessors. To produce that result, the additional circumstance was equally essential, that the property should be within the State." (Id. 356, 357). Counsel for the assessor urged upon the consideration of the court that as the property consisted of what the law denominates choses in action, being obligations of a tangible nature it was within the state because the relator was its owner. But the court again held that the legal fiction that personal estate follows its owner had no place in a well ordered system of taxation. It said:

"As to visible and tangible property capable of having an actual situs this fiction has not been allowed to prevail, so as to render such property liable to taxation when it was not within this state (People vs. Commissioner of Taxes, 23 N. Y. 224), and the reasoning of the Judge through which that conclusion was reached, is equally applicable to the present case though it was not intended to be applied to a case of this description. Upon that subject Judge Comstock remarked: 'This conclusion is intended to embrace only property which is visible and tangible so as to be capable of a situs away from the owner or his domicil; and I do not consider the question in reference to personal estate of a different description. It must be within this state in order to be subject to taxation, for so is the statute; but that may be true of choses in action, and obligations for the payment of money due to a creditor resident here from a debtor whose domicil is in another state. If the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another state for collection, investment and re-investment there, it may be that capital thus situated should be regarded as foreign and not

domestic, in the absence of any special statutory provision for such a case (*Id.* 240).’ That it should be so regarded results, necessarily in the theory of taxation previously considered from the circumstance that the right to tax is derived from the protection afforded by the laws to the property taxed, and that theory is maintained by this decision as the true source from whence the right of taxation is legally as well as logically secured.”

In *Hackfeld & Co. v. Luce*, Tax Collector, (1879) 4 Haw. 172, the Court having declared (p. 177) that the property of a non-resident could not be taxed “unless it has an *actual situs* within the jurisdiction,” and also that “it is quite competent for any government to provide that any tangible personal property situated within its jurisdiction may be taxed there irrespective of the residence of the owner,” stated that the questions involved were:

“Whether the *notes and securities* which the plaintiffs allege are in their possession, as agents of persons residing in foreign countries, *are property; and if they are property whether they have a situs within this country.*”

It answered both questions in the affirmative and in its decision cited with approval *People v. Gardner* (*supra*). After stating the question in that case, which was—whether capital invested in Wisconsin and Illinois, for which securities were taken and held in those states by the relator’s agents, were liable to taxation in New York, it said: The argument set forth in the opinion of the court is so applicable to this case that we quote from it largely:

"It is clear that the property on account of which the assessment is made, had no actual location or *situs* within this State (New York). For the moneys loaned and the securities taken and held for the payment of such loans were actually in the States of Wisconsin and Illinois. *So far as they were things having a substantial existence, they were in those States AND NOT ELSEWHERE.*"

It then proceeded with its own decision as follows:

"Applying that to the case before us, the property in question has *no situs* in Germany where the persons reside for whose benefit the securities are held, but so far as they have a substantial existence anywhere, they are in this country. We continue the quotation:

"The validity of the agreements, under which the loans were made, the protection of the securities taken for their payment and the remedies provided for enforcing the securities *depend alike upon their laws*; and in no respect do the persons for whose benefit the securities are held derive any benefit from the laws of the country in which he resides.
* * * Again the Court says:

"*By a legal fiction, the personal estate of the owner has for some purpose been deemed to follow its owner, but in the adjustment of systems of taxation, this fiction has been very generally rejected on the ground that it was productive of unjust consequences.* And other cases exist where, for a like reason, its application has been denied. As to visible and tangible personal property capable of having a *situs* away from the owner or its domicile, this fiction has not been allowed to prevail. * * * When the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another State, for collection, they must be regarded as being in the State where the securities are." (Hoyt v. Commissioner of Taxes, 23 N. Y. 224).

These Hawaiian cases have never been reversed and still stand as the law of the Territory. They decide that the situs of personal property, both tangible, e. g. goods and merchandise, and intangible, e. g. moneys (credits), notes and securities, have their situs for purposes of taxation where they are actually situated *and not elsewhere*; and that it cannot in one case be taxed or, in the other, escape from taxation by the introduction of a legal fiction which has no place in a well adjusted system of taxation.

In considering these Hawaiian cases it must be remembered that it is of no moment whether they, and the decisions in New York and other states cited in them, are or are not in harmony with the weight of authority elsewhere—the only question being as to whether or not they repudiated, in regard to taxation matters, the common law maxim above referred to.

We are at a loss to understand how, in view of what the Supreme Court of Hawaii *said* in those cases, the court below could arrive at the conclusion (Record, p. 47) that the court “merely intended to hold that the maxim is not of universal application and may yield to the exigencies of particular circumstances.”

In another case, Estate of Hall, 19 Haw. 531 (1909) it was held that shares of stock in a domestic corporation owned by a non-resident were for inheritance tax purposes, property *within* the Territory. It may be argued that the decision on that

point was obiter as the statute taxed all personal property "within or without the Territory" but the fact remains that the question as stated by the court (p. 532) was "Whether the shares referred to are property within this Territory," and if the maxim under discussion had been in force the shares would have been property in New Jersey where the testatrix was domiciled and not in Hawaii. The decision indicates that in the court's opinion, following its earlier decisions, the maxim was not in force.

The legislature is always presumed to know what is the existing state of the law whenever any statute is passed.

"As it is the function of the Legislature to express the national will by means of statutes, it is essential that the Legislature should know what is the existing state of the law whenever any statute is passed, and it is always presumed that the Legislature possesses such knowledge."

Endlich Interpretation of Statutes, Sec. 182, p. 251.

The maxim having no place in Hawaiian law as applied to taxation, it is obvious that the legislature, in placing a tax upon income derived from property in Hawaii, could neither in 1896, when the first income tax act was passed, or at any time subsequent, have intended to tax income derived from property which could have no situs for that purpose in Hawaii, except by virtue of a legal fiction which, as far as the Territory was concerned, did not exist.

G. Even if it should be held that the common law maxim *mobilia sequuntur personam* has not been repudiated by the Courts of Hawaii, so far as regards matters of taxation, the plaintiff-in-error claims that under the circumstances shown in the agreed facts, the bonds, notes and deposits have acquired a *business situs* on the mainland; that by reason of that fact, they are not "property in the Territory," and hence the income therefrom is not taxable under the present statute.

In the earlier period of the common law movable or personal property was mostly tangible and consisted largely of gold, silver and jewelry which were carried on the person, and horses, cattle and other animals which accompanied the person. Hence originated the legal fiction, expressed in the maxim, that personal property followed the person and had its *situs* where, and only where, its owner was. With the growth of industry and commerce, however, and the consequent increase in the volume and kinds of personal property, it became more and more a matter of practical necessity or convenience to apply the doctrine that legal fictions must yield to facts when justice so required.

A series of cases, commencing, we believe, with *Catlin v. Hull*, 21 Vt. 152, show a gradual judicial development in the course of which in taxation matters the fiction embodied in the maxim has lost much of its ancient force and has come to be honored more, if anything, in its breach than in its observance, and,

as said in *Commissioners vs. Leonard*, 27 Kans. 531, "it is subject to so many limitations and exceptions that it is quite as liable to mislead as to furnish a correct guide when considered alone."

It first came to be recognized that, at least, tangible personal property could be severed by law from the person of its owner and dealt with as having its situs, for purposes of taxation, and for various other purposes, where it actually was, even though its owner might be domiciled in another jurisdiction and even though the property might be regarded as also having a situs in such other jurisdiction for similar purposes. In other words, the property might have a situs and be taxed in each of two jurisdictions. Now, however, the law as to tangible personal property in this respect has evolved further still. It has, indeed, passed beyond the stage of statutory law to that of constitutional law, and now the taxability of tangible personal property, when it is permanently located in a jurisdiction other than that of its owner, not only is not confined to the jurisdiction of its owner, but *does not even exist* as to that jurisdiction.

See *United States v. Bennett*, 232 U. S. 299;

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;

Delaware L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;

So. Pac. Co. v. Kentucky, 222 U. S. 63, 74.

On the other hand, if the property is merely casually in a jurisdiction other than that of its owner, or

merely in transitu, it can be taxed only in the jurisdiction of its owner, because it has no other situs or domicile.

A similar course of evolution has been going on in the case of *intangible* personal property, although naturally it has not been going on so long and has not yet gone so far, inasmuch as intangible personal property (bonds, stocks, notes, accounts receivable, etc.) came into its modern position of importance later than tangible personal property.

As the law now stands, such property *may, in general*, be taxed at the domicile of the owner, but it does not follow that it may be taxed at the domicile of the owner in *all* cases; or that, in cases in which it might otherwise be taxed, it comes within the meaning of the particular statute in question; there may or may not be the *power* to tax, and there may or may not be the *intention* to tax. The doctrine that no question of physical situs arises in the cases of intangible property because it is not physical, and hence that its situs *must* be where its owner is because it can be nowhere else, has been in great measure discarded. It is now usually held that, at least under many circumstances, bonds, notes and credits which have assumed what may be called a concrete form,—i. e. are evidenced in a manner which gives the evidence some physical character of property,—are in themselves property, and not the mere evidences of debt, and that as such they may by law be severed from the person of their owner, and when so

severed, they have a situs and may be taxed where they are, even though they are in a jurisdiction other than that of their owner.

The severance which effects such a result occurs when they are used in or connected with business carried on in the place where they are physically located, or are in the custody of an agent there, who has more or less control over them, as for instance, the power to sell and reinvest the proceeds or otherwise deal with them, and the situs they thus acquire is called their *business situs*. From an examination of the authorities, which adhere to the general rule that personality for purposes of taxation follows the person of its owner, it will be found that they usually have in mind cases, (a) in which the certificates of stock, notes, bonds, etc., are in fact at the location of the owner, or, if elsewhere, that they are elsewhere only casually, or by reason of passage in transitu or merely temporarily for the purpose of evading taxes or otherwise, and have not there acquired a business situs, or (b) where the question is not of the *intention* but of the *power* to tax. In such cases courts even still often speak of a bond, certificate of stock, etc., as mere evidence of a debt, and of the debt itself as the property, which, of course, is the property of the creditor and not of the debtor, and so apparently must have its situs where the creditor is. In examining the authorities, the particular facts in each case must be considered; it is not enough merely to get as far as the general rule.

As to what constitutes "business situs" see:

Johnson County vs. Hewitt, (Kan.) 14 L.R.A.
(NS) 493;

"It is not necessary to determine precisely what facts will be sufficient in either case to establish the independent business situs for notes and mortgages, but, generally, the element of separation from the domicile of the owner, and fairly permanent attachment to some foreign locality should appear, together with some business use of them, or some power of managing, controlling, or dealing with them in a business way."

That the taxable situs of notes, bonds, mortgages and the like, being in themselves property, is, in the absence of express statutory direction, the place where they are found, and not the domicile of their owner, see *Wilcox vs. Ellis*, 14 Kan. 588, in which the power of the state to tax a citizen and resident of Kansas on money due him in Illinois evidenced by a note, was denied.

Fisher vs. Commissioner of Rush County, 19
Kan. 414;

Blain vs. Irby, 25 Kan. 499;

People vs. Gardner, 51 Barb. 352;

People ex rel Jefferson vs. Smith, 88 New
York, 576;

Poppleton vs. Yanhill, 18 Or. 377;

*Commonwealth vs. West India Oil Refining
Co.* (Ky.) 129 S. W. 301;

Commonwealth vs. Avery, (Ky.) 174 S. W.
519.

People ex rel Jefferson vs. Smith (*supra*) was a case in which the right to tax mortgage securities, held outside the state was denied. The statute (2 R. S.—7th Ed.—981) read as follows:

“All lands and all personal estate within this State whether owned by individuals or by corporations shall be liable to taxation subject to the exemptions hereinafter specified.”

The language of the court was in part as follows:

“The statute providing for the disposition of personal estate within this state was not intended to subject to taxation personal securities actually in another state, held, managed and controlled there, under the protection of the laws of that state, and subject to taxation there in the hands of agents. * *

“It is clear from the statutes referred to and the authorities cited and from the understanding of businessmen in commercial transactions, as well as jurists and legislators, that mortgages, bonds, bills and notes, have for many purposes come to be regarded as property and not as the mere evidence of debts, and that they may thus have a situs at the place where they are found like other visible tangible chattels.”

The effect of the New York decisions so far as chosees in action are concerned, was obviated by the passage of a statute (L. 1883 c. 392, Sec. 1) declaring that all debts however secured or wherever the security might be held should be deemed for the purpose of taxation personal estate within the state.

In Commonwealth v. West India Oil Refining Co., the defendant was a Kentucky corporation. All of its property was located in Cuba and Porto Rico. Its money was earned and kept there, and its accounts

were due and payable there. On these facts the county court held that the cash was not liable to taxation in Kentucky, but that the accounts were liable. On appeal to the circuit court, it was held that neither the cash, nor the deposit in the bank there, nor the accounts had a taxable situs in Kentucky. An appeal was taken to the Court of Appeals of Kentucky which not only affirmed the decision of the circuit court, but held that not only was this property not taxable as not being within the statute, but that Kentucky had no jurisdiction to tax, even if the property had been within the scope of the statute. The judgment of Hobson J., contained the following:

"For many purposes the domicile of the owner is deemed the situs of his personal property, but this is only a fiction from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should, and is not allowed to be a controlling feature in matters of taxation."

In *Commonwealth v. B. F. Avery & Sons*, the defendant was a Kentucky corporation having its principal office in Kentucky and branches in five other states. It was held that accounts receivable at the branch offices were not taxable in Kentucky; but that they had a taxable business situs in the state of the branch offices.

Among the earlier Federal cases to which reference is most frequently made in the later cases is *State Tax on Foreign-Held Bonds*, 15 Wall. 300, decided in 1873. In that case it was held that the inter-

est on bonds of a domestic corporation owned by a non-resident could not be taxed at the domicile of the corporation. The decision is lengthy, but the following passage referring to *bonds* and *bank notes* is of particular interest on the subject in hand:

"It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidence of debt, *are not separated* from the possession of the owners."

It will be noticed that the bonds were in fact in the possession of the non-resident owner; also that the court had then got to the point of holding that State and municipal bonds as well as circulating bank notes had come to be regarded in this respect as on the same level with tangible personal property, but that that was as far as it thought it could go then, although it *at least suggested a question as to other securities when they were in fact separated from their owners.* That decision has later been discussed and narrowed down in many subsequent decisions,

and in *Blackstone v. Miller*, 188 U. S. 189, in which a debt and also a deposit with a trust company were involved, the court, with one dissenting vote, said with reference to that decision:

"The taxation in that case was on the interest on bonds held out of the State. *Bonds and negotiable instruments are more than merely evidence of debt.* The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337. Therefore, considering only the place of the property, it was held that bonds held out of the State could not be reached. The decision has been cut down to its precise point by later cases."

The taxable situs of *notes* and *mortgages* was involved in the case of *New Orleans v. Stempel*, 175 U. S. 309, (1899) and it was held that:

"Notes and mortgages, the owner of which is domiciled in another state, when they are kept within the state by an agent, may be subject to taxation by the laws of the state in which they are held."

Mr. Justice Brewer said:

"If we look to the decisions of other States we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by *note*, *bill*, *mortgage* or *other written instrument*, and that written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner, to be by him used for the purposes of collection and deposit or reinvestment within the State, its *taxable situs is in the State*. See *Catlin v. Hull*, 21 Vermont, 152, in which the rule was thus announced (pages 159, 161): 'It is undoubtedly true that, by generally acknowledged principles of public law, personal chattels follow the person of the owner, and that upon his death, they are to be distributed according to the law of his domi-

cile; and in general, any conveyance of chattels, good by the law of his own domicile, will be good elsewhere. But *this rule is merely a legal fiction*, adopted from considerations of general convenience, and policy, for the benefit of commerce and to enable persons to dispose of their property, at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country, where the same is situate.'"

See also *Bristol v. Washington County*, 177 U. S. 133, (1900) dealing with the taxation situs of *bonds* and *mortgages* belonging to a resident of New York, and held by an agent resident in Minnesota with authority to invest and reinvest the proceeds. It was decided that the securities were taxable in Minnesota. In the course of the decision Fuller, C. J., cited with approval the case of *Re Jefferson*, 35 Minn., 215, in which the Court, after discussing the doctrine *mobilia sequuntur personam*, says:

"For many purposes the domicil of the owner is deemed the situs of his personal property. This, however, is only a fiction, from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should. It is not allowed to be controlling in matters of taxation. * * * * *

"The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Now, here was property within this state, not for a mere temporary purpose, but as permanently as though the owner resided here. It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent princi-

pal. It was exclusively under the protection of the laws of this state. It has to rely on those laws for the force and validity of the contracts on the loans, and the preservation and enforcement of the securities. *The laws of New York never operated on it.* If credits can ever have an actual situs other than the domicil of the owner, can ever be regarded as property within any other state, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case."

See *Board of Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, (1903).
Union Co. v. Kentucky, 199 U. S. 194, (mortgages and stocks).

Also,

Liverpool, London & Globe Insurance Co. v. Board of Assessors for Parish of Orleans, 221 U. S. 346 (1911) (Credits).

"When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction. *The legal fiction*, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of *actual control elsewhere*. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hand of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and control over the debtor at his domicile is control of the ordinary means of enforcement. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have

had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of the creditor were to be enforced. *If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there.*"

Also *Louisville & Jefferson Ferry Company v. Kentucky*, 188 U. S. 385, in which it was decided that a franchise granted by the proper authorities of Indiana, for maintaining a ferry across the Ohio River from the Indiana shore to the Kentucky shore, is an Indiana franchise, an incorporeal hereditament derived from, and having its legal situs for purposes of taxation in Indiana, and not in Kentucky.

The latest case in which this question has arisen in the Federal Courts is *De Ganay v. Lederer*, 239 Fed. 568. The Federal Income Tax Law of 1913 imposed the tax, so far as non-residents were concerned, upon the "entire net income from all property owned and every business, trade, or profession carried on in the United States." Thus the statute is substantially the same as that in Hawaii. The question arose under that statute as to whether the income of a non-resident from stock and bonds of domestic corporations and mortgages in the hands of an agent in this country empowered to sell, assign and transfer them and to reinvest the proceeds, was subject to the tax,—on the theory that such stocks,

bonds and mortgages were "property owned * * * in the United States." The District Judge held that they were. Among other things he said:

"A bank note is but a promise to pay, but the concept of it soon changes to that of regarding it as itself concrete property, occupying space and having a situs. The same concept is readily extended to deposits in bank and to bonds, and indeed to what are known under the generic term of investments, mortgages and ground rents, and the like. They all come to be visualized, until they have an existence as real as that of physical things. Indeed it is allowable in common speech, and just as intelligible to speak of a person having ground rents in America, or indeed investments in America, as it is to say he had or owns a farm in America. * * * * *

"Property is 'in' the United States when it can here be reached, whether the property be a house and lot, or whether it be bonds and mortgages.

"To return from these abstractions to the precise question before us, our conclusion is that this act of Congress, if read in the light of critical accuracy, does not tax the property on which this tax was levied; but if the language is interpreted in the light of the commonly accepted meaning of the words used, it does tax it, and the tax was properly collected."

Referring to the opinion of Mr. Justice Field in Foreign Held Bonds, 15 Wall. 300, above referred to, he continued:

"It is interesting to note (what was before not observed) that Mr. Justice Field, who delivered the opinion of the court, recognized that not only tangible personal property might have situs different from that of the domicile of the owner, but that state and municipal bonds and other forms of intangible property were recognized as in themselves physical property, and known as such in common speech, and

therefore also capable of having a situs of their own. He distinguished between municipal bonds, and the other property of like kind enumerated by him, and corporate bonds. This opinion was delivered in 1872. What was recognized by him as true of municipal bonds in 1872 seems to be equally true of corporate bonds and stocks in 1913. It would be an interesting confirmation of the observations hereinbefore made if public usage, which in 1872, included state and municipal bonds and bank notes among tangible possessions had progressed in 1913 to the point of embracing all stocks and bonds in the same classification."

The case was appealed to the Circuit Court of Appeals, which certified it to the Supreme Court. The latter (*De Ganay v. Lederer*, 250 U. S. 376) sustained the District Judge, basing its opinion in part upon the popular as distinguished from the technical construction of the statute and in part upon the fact that the stocks, bonds and mortgages were in fact in this country and were held by an agent which had considerable authority over them. The language of the court is in part as follows:

"We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim *mobilia sequuntur personam* applies in this instance, and that the situs of the property was at the demicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. * * * * *

"In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a power of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. *It is difficult to conceive how property could be more completely localized in the United States.* There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property within the United States within the meaning of Congress as expressed in the statute under consideration."

By the above case the status of stock certificates and bonds as property in themselves, and capable of having a "business situs" separate from the owner is definitely established; and the maxim that the situs of such property follows that of the owner, when it is separated from him, is clearly repudiated. This must be so for if the maxim had been followed then the intangible personality of an alien resident of France could not possibly have been held to be "property in the United States." It is true as stated by the Court below (Record, p. 42) that the United States Supreme Court "did not infer that the *income* of such property would not have been taxable also at the domicile of the owner"; the question was not

even touched upon in the decision. The result however of the cases establishing the doctrine of "business situs" is, we submit, that when intangible property acquires such a situs, then, the reason for the general rule that such property has the situs of its owner because it has no other situs, failing, the rule itself yields, as it is well established it now does in the case of tangible property located in a foreign jurisdiction; and that such property is not *property in* the country where the owner has his domicile, and neither it nor the income thereof can be reached for taxation purposes *unless* the legislature of the owner's domicile expresses in appropriate language the intention to tax it wherever situate. (See the cases from New York, Kansas, Oregon and Kentucky above cited). As already pointed out this intention is manifested in various ways as, for example, by the use of expressions providing for taxation of property—or income derived from property—"within the state or elsewhere," "within or without the state," or "income from whatever source derived." The language of the Hawaiian act is not sufficient to cover the income of such property, and it must be borne in mind that *the Supreme Court of Hawaii has, in Hackfeld & Co. v. Luce, supra, committed itself to the proposition that notes and securities are taxable only in the jurisdiction in which they actually are, and that they have NO SITUS elsewhere.*

The De Ganay case is also direct authority in support of the contention made earlier herein that the language of the statute in Hawaii "property owned

in the Territory" refers to the location, and not to the ownership, of the property.

An attempt is made by the court below (Record, pp. 41, 42) to distinguish the De Ganay case from the case at bar by the fact that in the former the agent had a power of attorney which gave it authority to sell, assign and transfer the securities and reinvest the proceeds of sale as it might deem best, whereas in the latter the agents were apparently clothed only with authority to purchase and hold the securities, to collect the income and place it to the credit of the principal to be drawn upon from time to time as required. The court below overlooked the fact that the agents in the case at bar had evidently a power of sale, as the agreed facts show that the securities were held by the agent "until sold." We confess that we fail to see any distinction in the facts of the two cases that would localize or give the securities a business situs in the one and not in the other; in both cases the agent had physical possession of the securities with control over them for business purposes; the agent apparently had a power of purchase and sale, and also a power to collect the income.

H. It is submitted that none of the cases cited in its decision by the court below are authorities against the contentions made in the case at bar. In so far as they hold that bonds, negotiable instruments, certificates of stock, etc., are "only evidences of debt," e. g. Kirtland v. Hotchkiss, 100 U. S. 491,

they are in conflict with and are overruled by *De Ganay v. Lederer*. In *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, it appeared that moneys sought to be taxed were placed in another state to evade taxation (See 181 S. W. 1096, 1097) and the question of a business situs could not therefore arise. The only question involved in the majority of those cases was the *power* of the state to tax such property by the use of appropriate language; in all, (see for example *Kirtland v. Hotchkiss*, 100 U. S. 491; *New Orleans v. Stempfel*, 175 U. S. 309; *Liverpool & London Globe Ins. Co. v. Board of Assessors*, 221 U. S. 346) there was statutory warrant for the taxation, and it was the constitutionality of such statutes that was the object of attack.

Of that nature is the case of *Maguire v. Trefry*, 254 U. S. 12, cited by the Court below and termed the "controlling authority." This case we submit has no bearing whatsoever upon the question in the case at bar, viz.:

"Is the interest on the bonds, notes and deposits mentioned in the submission taxable under a statute which provides for the taxation only of the income derived from "property in the Territory?"

The case arose under a statute of Massachusetts in which it is provided:

"If an inhabitant of this commonwealth receives income from one or more executors, administrators or trustees, none of whom is an inhabitant of this commonwealth, or has derived his appointment from a court of this commonwealth, such income shall be subject to the taxes assessed by this act, according to

the nature of the income received by the executors, administrators or trustees,"

and the only question before the court was as to "the *right* of the state to tax the beneficiary of a trust at her residence although the trust itself may be created and administered under the laws of another state." (Id. p. 16.)

The case at bar raises no question as to the *right* of the Territory, if it so chooses, to tax the income of the securities and deposits under discussion, but only the question as to whether the legislature has in fact made such income taxable.

In concluding this branch of the case we submit: that by no principle of statutory construction can the income of the bonds, notes and deposits in question be brought within the language of the statute as income derived from "property within the Territory"; that the legislature by the use of the same language in respect to residents and non-residents (persons and corporations) intended that all should be on the same plane and that the income of property, and only property, which was actually within the Territory should be taxed; that the act should be construed in accordance with the practical construction which for over twenty-five years has been placed upon it by those charged with the duty of administering it; that the fiction embodied in the maxim *mobilia sequuntur personam* has never, so far as it relates to taxation, been adopted as part of the law of Hawaii, but has been emphatically repu-

diated and therefore cannot be read into the statute; that if that fiction has not been so repudiated the property in question had acquired a *business situs* on the mainland and therefore was not "property within the Territory" and the income therefrom is not taxable under the language of the present act; and that any doubt as to whether the income is taxable or not should be resolved in favor of the plaintiff-in-error.

For the reasons above stated we earnestly contend that the judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted,

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APPENDIX.

ACT 65, SESSION LAWS OF 1896.

SECTION 1. From and after the first day of July, A. D. 1897, there shall be levied, assessed, collected and paid annually upon the gains, profits and income derived by every person residing in the Republic, and by every person residing without the Republic, from all property owned, and every business, trade, profession, employment or vocation carried on in the Republic, and by every servant or officer of the Republic, wherever residing, a tax of one per cent on the amount so derived; provided, that where the gains, profits or income of any such person who resides within the Republic, or of any servant or officer of the Republic wherever residing, shall not have exceeded the sum of Four Thousand Dollars for the preceding twelve months, only so much of such gains, profits or income as exceeds the sum of Two Thousand Dollars, shall be liable to such tax, and the tax herein provided for shall be assessed by the Assessors and Collectors for the time being for the several Tax Divisions of the Republic, and collected and paid upon the gains, profits and income for the year ending the 30th day of June next preceding the time for levying, assessing, collecting and paying the said tax.

SECTION 2. There shall be levied, assessed, collected and paid, except as herein otherwise provided, a tax of one per cent annually on the net profits or income above actual operating and business expenses

from all property owned, and every business, trade, employment or vocation carried on in the Republic, of all corporations doing business for profit in the Republic of Hawaii, no matter how or where created and organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations organized and conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, orders or associations operating upon the lodge system and providing for the payment of life, sick, accident or other benefits to the members of such societies, orders or associations, and dependents of such members, nor to insurance companies taxed on a percentage of the premiums under the authority of any other Act; nor to the stocks, shares, funds, real and personal property, or securities held by any fiduciary or trustee for charitable, religious, educational or scientific purposes.

SECTION 3. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Republic of Hawaii, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the year from sales of real estate, including leaseholds for any term purchased within two years previous to the close of the year for which income is estimated; dividends upon the stock of any corporation; interest received or accrued upon all notes, bonds, mortgages

or other forms of indebtedness bearing interest whether paid or not, if good and collectable, less the interest which has become due from said person or corporation, or which has been paid by him or it during the year; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property less the amount expended in the purchase or production of the same, and in the case of a person, not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatever.

The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund or account, or carried to the account of any fund or used for constructions, enlargements of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporation.

In computing incomes, the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property, shall be deducted, and also all interest due or paid within the year by such person or corporation on existing indebtedness. And all government taxes and license fees paid within the year shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the

same, whether such person or corporation be owner, tenant or mortgagor; also, losses actually sustained during the year incurred in trade or arising from fires, storms or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless.

Provided, that no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments made to increase the value of any property or estate.

Provided, further, that where allowable herein only one deduction of two thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interest, the aggregate deduction in their favor shall not exceed two thousand dollars.

And provided, further, that in case where the salary or other compensation paid to any person shall not exceed the rate of two thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits or income of the person to whom the same shall have been paid.

Provided, also, that in assessing the income of any person or corporation, there shall not be included the amount received from any corporation as dividends upon the stock of such corporation if the tax of one per cent has been paid upon its net profits by said corporation as required by this Act, nor any gift or inheritance otherwise taxed as such.

ACT 20, SESSION LAWS OF 1901.

SECTION 1. From and after the first day of July, A. D. 1901, there shall be levied, assessed, collected and paid annually upon the gains, profits and income, over and above one thousand dollars, derived by every person residing in the Territory of Hawaii from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every person residing without the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every servant, or officer, of the Territory wherever residing, a tax of **TWO PER CENT** on the amount so derived during the year preceding.

SECTION 2. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of **TWO PER CENT** on the net profit or income above actually operating and business expenses, from all property owned, and every business, trade, employment or vocation carried on in the Territory of Hawaii, of all corporations doing business

for profit in the Territory, no matter where created and organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies taxed on a percentage of the premiums under the authority of another Act.

SECTION 3. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities hereafter created by the Territory the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the year preceding from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever.

SECTION 4. The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among sharehold-

ers from any fund or account, or carried to the account of any fund or used for construction, enlargements of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporation.

In computing incomes, the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property, shall be deducted, and also all interest paid by such person or corporation on existing indebtedness. And all government taxes and license fees paid within the year shall be deducted from the gains, profits or income of the person who or the corporation which has actually paid the same, whether such person or corporation be owner, tenant or mortgagor; also all losses actually sustained during the year incurred in trade or arising from losses by fire not covered by insurance, or losses otherwise actually incurred.

Provided, that no deduction shall be made for any amount paid out for new buildings, permanent improvements or betterments made to increase the value of any property or estate.

Provided further, that no deduction shall be made for personal or family expenses, the exemption of one thousand dollars mentioned in Section 1 being in lieu of same.

Provided further, that where allowable herein only one deduction of one thousand dollars shall be made from the aggregate annual income of all the

members of one family composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except where two or more wards are comprised in one family, in which case the aggregate deduction in their favor shall not exceed one thousand dollars.

Provided further, that in assessing the income of any person or corporation there shall not be included the amount received from any corporation as dividends upon the stock of such corporation if the tax of two per cent has been assessed upon its net profits by said corporation as required by this Act, nor any bequest or inheritance otherwise taxed as such.

REVISED LAWS OF HAWAII, 1915.

SEC. 1305. RATE ON PERSON'S INCOME. There shall be levied, assessed, collected and paid annually upon the gains, profits and income over and above fifteen hundred dollars, derived by every person residing in the Territory of Hawaii, from all property owned, and every business, trade, profession, employment or vocation, carried on in the Territory, and by every person residing without the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every servant or officer of the Territory, wherever residing, a tax of two per cent on the amount so derived during the taxation period as herein defined.

The taxation period within the meaning of this chapter shall be the year immediately preceding the first day of January of each year, in which such tax is payable.

SEC. 1306. ON CORPORATION INCOME. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent on the net profit or income above actual operating and business expenses derived during each taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created and organized ; provided, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies, taxed on a percentage of the premiums under the authority of another law.

SEC. 1307. INCOME INCLUDES WHAT. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempt from all taxation ; profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years ;

dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever during said taxation period.

SEC. 1308 (as amended by Act 157, Session Laws of 1917). **INCOME, HOW COMPUTED.** The net profits or income of all corporations shall include the amounts paid or payable to, or distributed or distributable among shareholders from any fund, or used for construction, enlargement of plant, or any other expenditure or investment, paid from the net profits, made or acquired by said corporation, during the taxation period next preceding.

In computing incomes the necessary expenses actually incurred in carrying on any business, trade, profession or occupation, or in managing any property, shall be deducted, and also all interest paid by such person or corporation on existing indebtedness. And all government taxes, and license fees, paid within the taxation period next preceding shall be deducted from the gains, profits or income of the person who, or the corporation which, has actually paid the same, whether such person or corporation be owner, tenant or mortgagor; also all losses actually

sustained during the taxation period next preceding, incurred in trade, or arising from losses by fire not covered by insurance, or losses otherwise actually incurred, and including a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in a business or trade; provided, however, that in no case shall such depreciation exceed the amount actually shown by and as written off the books.

Provided, that no deduction shall be made for any amounts paid out for new buildings, permanent improvements or betterments, made to increase the value of any property or estate.

Provided, further, that no deduction shall be made for personal or family expenses, the exemption of fifteen hundred dollars for each taxation period, mentioned in Section 1305, being in lieu of the same.

Provided, further, that where allowable under this chapter, only one deduction of fifteen hundred dollars for each taxation period shall be made from the aggregate annual income of all the members of one family, composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except where two or more wards are comprised in one family, in which case the aggregate deduction in their favor shall not exceed fifteen hundred dollars for each taxation period.

Provided, further, that in assessing the income of any person or corporation there shall not be included the amount received from any corporation as dividends upon the stock of such corporation if the tax of two per centum has been assessed upon the net profits of such corporation as required by this chapter, nor any bequest or inheritance otherwise taxed as such.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

158

EWA PLANTATION COMPANY,
an Hawaiian Corporation,
Plaintiff-in-Error,

vs.

CHARLES T. WILDER,
as Tax Assessor for the First
Taxation Division, Territory
of Hawaii,
Defendant-in-Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

JOHN ALBERT MATTHEWMAN,
Attorney General of the Territory of Hawaii.

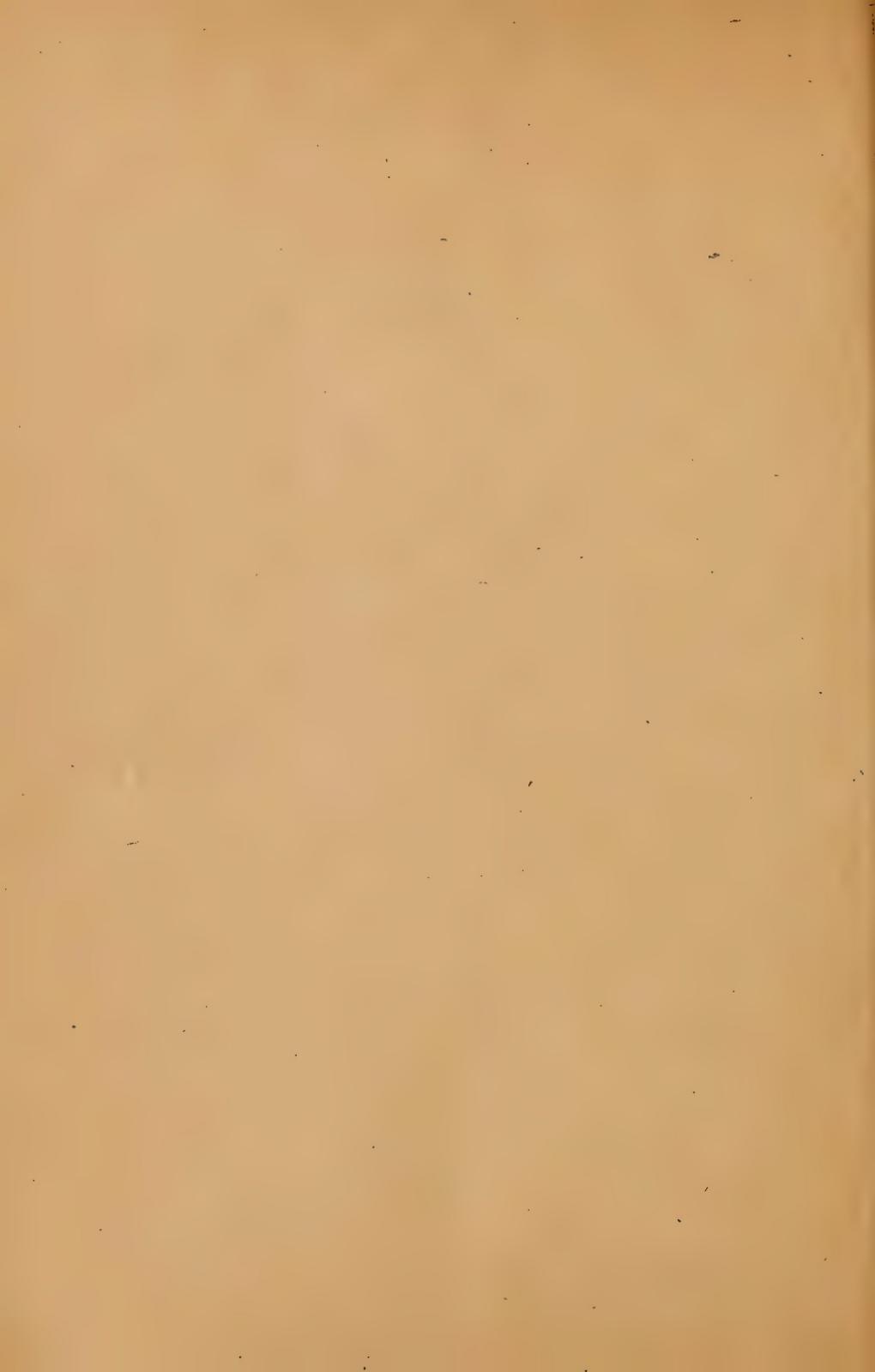
MARGUERITE K. ASHFORD,
Of Counsel.

Filed this day of
1923.

F. D. MONCKTON, Clerk.

By, Deputy Clerk.

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No. 3876
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FOR THE
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EWA PLANTATION COMPANY,
a Hawaiian Corporation,
Plaintiff-in>Error,

vs.

CHARLES T. WILDER, as Tax Assessor
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tory of Hawaii,
Defendant-in>Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.*

STATEMENT.

Upon the Statement of the Case in the brief of Plaintiff in Error, three questions are presented for the determination of this court:

I. Whether this Court will accord controlling weight to the construction of the local tax statutes by the Territorial Supreme Court, and so will affirm the judgment rendered by that court in this cause;

II. Whether the judgment of the local court that the receipts of plaintiff in error for strike losses determined by the decrease estimated in taxable net profits arising from the strike were taxable as income for 1920 under the Hawaiian statute is so clearly wrong as to require reversal at the hands of this court;

III. Whether the judgment of the Hawaiian court that income from securities purchased and held for safe-keeping in California until sold was income derived from property owned in Hawaii and taxable under the Hawaiian statute is so clearly erroneous as to require reversal at the hands of this court.

ARGUMENT.

I.

It will be observed by the court that this writ of error is to review a decision of the Territorial Supreme Court based entirely upon a construction of the tax laws of the Territory.

THE FEDERAL APPELLATE COURT WILL NOT DISTURB THE DECISION OF THE TERRITORIAL SUPREME COURT INTERPRETING A LOCAL LAW, UNLESS THERE IS CLEAR ERROR.

While this court has, of course, full power to reverse the Territorial Supreme Court in any case that is brought up upon appeal or writ of error, it is the rule of action of the appellate court, long sanctioned

and established, that only upon conviction of clear error will it disturb the finding of the local court upon matters of local law.

Cardona v. Quinones, 240 U. S. 83, 88.

Martinez v. Mendez, 256 Fed. 596.

The court will not reverse unless there is "manifest error."

Treat v. Grand Canyon Ry. Co., 222 U. S. 448, 452.

English v. Arizona, 214 U. S. 359.

Santa Fe County v. Coler, 215 U. S. 296.

The "settled rule" of the Supreme Court of the United States is to accept the construction placed by a Territorial court upon a local statute and not to disregard the same unless constrained to do so by the "clearest conviction of serious error."

Work v. United Globe Mines, 231 U. S. 595, 599.

The construction of a local statute by the local Territorial court "is of great if not controlling weight."

Lewis v. Herrera, 208 U. S. 309, 314.

The views of the Territorial court are "very persuasive" on the United States Court as to the construction of local statutes.

Crary v. Dye, 208 U. S. 515, 519.

Thus, even where the Territorial court in construing the statute in question ignored the rule of statutory interpretation, which demands that when a statute is copied from another state, the interpretation which had theretofore been placed upon that statute is regarded as transplanted also, the Su-

preme Court of the United States affirmed the construction of the Territorial court.

Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474, 479.

APPLICATIONS OF THE RULE IN APPEALS FROM THE SUPREME COURT OF HAWAII.

The rule that the construction by the local court of local law is of great if not controlling weight with the appellate court has been applied both by the Supreme Court of the United States, and by this court in passing upon appeals from Hawaii.

Thus, this court has affirmed the construction by the Territorial Supreme Court of Territorial statutes.

Hawaii County v. Halawa Plantation, 239 Fed. 836, 839.

Castle v. Castle, 281 Fed. 609, 612.

The Supreme Court of the United States has affirmed the local construction of the local law of Hawaii in the following cases:

Kealoha v. Castle, 210 U. S. 149.

Cotton v. Hawaii, 211 U. S. 162.

Lewers & Cooke v. Atcherley, 222 U. S. 285.

Kapiolani Estate v. Atcherley, 238 U. S. 119.

John Ii Estate v. Brown, 235 U. S. 342.

THE ISSUES PRESENTED TO THIS COURT IN THE INSTANT CASE ARE ESSENTIALLY MATTERS OF LOCAL LAW, AND THE CONSTRUCTION OF THE LOCAL SUPREME COURT IS ENTITLED TO GREAT, IF NOT CONTROLLING, WEIGHT.

Taxation laws are essentially local in their nature, as the provisions for taxation in every state, territory or municipality differ from others as a rule, according to the necessities of the different communities and the temper of the different law-making bodies.

"No question is more clearly a matter of local law than one arising under the tax laws."

Lewis v. Monson, 151 U. S. 545, 549.

Bardon v. Improvement Co., 157 U. S. 327, 331.

This very court, in a decision construing a tax law of Hawaii rendered no later than June 5, 1922, adhered to this "settled rule" of decision, saying:

"The questions thus involved call for the construction of the local territorial statute, and while this court is, of course, not precluded from reviewing the ruling of the Supreme Court of the Territory as it would a decision of a state Supreme Court under similar circumstances, it naturally will lean toward the interpretation adopted by that court, and will not be disposed to disturb the decision unless there is clear error. *Fox v. Haarstick*, 156 U. S. 679; *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization*, 206 U. S. 474; *English v. Territory of Arizona*, 214 U. S. 359; *Clason v. Matko*, 223 U. S. 646. And no such error appears in the instant case."

Castle v. Castle, 281 Fed. 609, 612.

The principle has been affirmed in the following cases dealing with Territorial tax statutes.

Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization, supra.

English v. Territory of Arizona, supra.

Treat v. Grand Canyon Ry. Co., supra.

Santa Fe County v. Coler, supra.

It is respectfully submitted that the issues before the court in the instant case fall within the same category as did the Castle case; and that the decision of the Territorial Supreme Court interpreting Sections 1306 and 1307, R. L. Hawaii, 1915, concerning taxation should receive the same affirmance from this court as it rendered when the Hawaiian Supreme Court interpreted R. L. Hawaii, 1915, Section 1323, concerning taxation in the Castle case, just cited.

II.

While the statement of the plaintiff in error on the strike losses is, in the main, correct, yet one very significant feature in the Submission of this point (Record p. 3) was omitted from that statement. It appears that the losses underwritten by the Hawaiian Sugar Planters' Association were to be determined in amount "by the decrease estimated in taxable net profits arising from or due to the disturbed labor conditions." Thus the proposition set forth by Ewa Plantation in its brief (Brief pp. 11 and 12) that "it could not be known in the year 1920, therefore, whether the compensation moneys were merely a return of capital or partly a return of capital and partly profit" and "the assessor had not the power 'to convert a sum received—as compensation for damages caused by the laborers' strike' wholly into a profit upon which the taxpayer should pay income tax" has not the same force that it would have in the absence of this feature of the Submission. Since

the contributions made through the Hawaiian Planters were determined by an estimated decrease in taxable net profits, that determination should certainly characterize the contribution. It was a present payment in liquidation of present and future profits foregone, and certainly cannot be considered as compensation for capital, or, indeed as anything but a present realization of taxable profits.

THE STRIKE LOSSES.

The question presented is whether the contributions of the Hawaiian Sugar Planters' Association, an organization comprising every sugar plantation and mill company in the Territory, to Ewa Plantation, in liquidation of the losses sustained by Ewa Plantation in connection with fighting the labor strike on that plantation, the amount of the contribution being determined by the estimated decrease in taxable net profits of Ewa arising from or due to the disturbed labor conditions should be apportioned as income received during 1920, 1921 and 1922, or should be taxed as income for 1920, the year in which it was actually received. The contention of the taxpayer is that it should be apportioned over the three years. The contention of the Territory is that it was income taxable entirely during the year 1920. The determination of the controversy rests entirely in the interpretation of the following Hawaiian statutes on taxation and upon the Hawaiian decisions construing those statutes.

"Sec. 1306. On corporation income. There shall be levied, assessed, collected and paid annually, except as hereinafter provided, a tax of two per cent. on the net profit or income above actual operating and business expenses derived during each taxation period, from all property owned, and every business, trade, employment or vocation, carried on in the Territory of Hawaii, of all corporations, doing business for profit in the Territory, no matter where created and organized; provided, however, that nothing herein contained shall apply to corporations, companies or associations, conducted solely for charitable, religious, educational or scientific purposes, including fraternal beneficiary societies, nor to insurance companies, taxed on a percentage of the premiums under the authority of another law."

"Sec. 1307. Income includes what. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all other gains, profits and income derived from any source whatsoever during said taxation period."

The contention of the taxpayer expressed in simple terms is this: that the provision of Section 1307 providing that "in estimating the gains, profits and

income of any person or corporation there shall be included * * * the amount of sales of all movable property less the amount expended in the purchase or production of the same * * * and all other gains, profits, and income derived from any source whatsoever during said taxation period" establishes a method of taxation based upon the "crop system" of raising sugar in Hawaii whereby in returning the profits realized from the sale of each of the three annual crops which are growing at the same time, the amounts expended in the production of each crop, whether expended in the year of the sale or in the two years preceding its maturity, are to be deducted from the amount of that sale in determining the taxable income; that this contention is supported by the case of *Tax Assessor v. Laupahoehoe Sugar Company*, 18 Haw. 206, and the *Income Tax Appeal Cases*, 18 Haw. 596, and that finally contributions of money to reimburse the plantation for expenses incurred in fighting a labor strike properly come within the words of the statute "less the amount expended in the purchase or production" of the sugar crop.

It is true that nowhere does the taxpayer state baldly that contributions toward fighting the strike are "amounts expended in the purchase or production" of movable property, to-wit: sugar cane. It characterizes the statute and the decisions above cited as "establishing a crop system of accounting" and thereby seeks to include within the wording of

the statute all expenses which it may arbitrarily assign to the three yearly crops which may be growing at the time the expenses occur or the contributions are received.

The contention of the Territory is that in deducting amounts from the profits of the sales, or in classifying moneys received as amounts of sales, of all movable property, such sums must come within the meaning of the phraseology of the statute; that contributions of other interested parties toward fighting a strike can in no sense be regarded either as "the amount of sales of all movable property" nor can they be regarded as "an amount expended in the purchase or production of the same" nor even—to go to the furtherest length with the taxpayer—can they be regarded as reimbursements for the amounts expended in the purchase or production of such movable property; that since they come neither within that portion of the statute just quoted, nor within the other designated sources, these contributions properly come within that phrase of the statute which defines as taxable income "all other gains, profits and income derived from any source whatsoever during said taxable period" and that they must therefore be assessed as taxable income for the year, or taxable period, in which they were received, to wit: 1920.

THE STRIKE LOSS RECEIPTS WERE
NEITHER "AMOUNTS EXPENDED IN THE
PURCHASE OR PRODUCTION" OF "MOVABLE

PROPERTY" SOLD NOR WERE THEY REIMBURSEMENTS FOR AMOUNTS EXPENDED IN THE PURCHASE OR PRODUCTION OF MOBILE PROPERTY SOLD.

Chapter 4, Sec. 9, R. L. 1915, Hawaii, on the construction of laws provides that the words of a law are generally to be understood in their most known and used signification without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.

It is submitted that not merely the general and popular meaning but the only possible meaning of the phrase "the amount of sales of all movable property less the amount expended in the purchase or production of the same" excludes a receipt of moneys contributed under contract as a share in fighting a labor strike, the amount being determined by the decrease in taxable profits of the strike-fighting company during the period of the strike. The amount, it will be observed, is not determined by a diminution in the amount of sale price of movable property; it is not determined by amounts expended in the purchase or production of that movable property, the cane. It is determined purely by a loss of profits due to a struggle with striking laborers.

In other words, if it is in any degree akin to what the taxpayer contends, then it is so only because the contribution may be regarded as a reimbursement of the plantation, not for the amount of cane pro-

duced, not for the amounts expended for the purchase or production of that cane, but because it seemed desirable to all the plantations for their future benefit that the plantation upon which the strike occurred should forego its production for a certain time. It is reimbursement perhaps for a diminution in production but certainly not a reimbursement for the production itself.

THE AMOUNT CONTRIBUTED CANNOT POSSIBLY BE REGARDED AS COMING WITHIN SECTION 1308 PROVIDING THAT IN COMPUTING INCOMES THE NECESSARY EXPENSES ACTUALLY INCURRED IN CARRYING ON ANY BUSINESS, TRADE, PROFESSION OR OCCUPATION OR MANAGING ANY PROPERTY SHALL BE DEDUCTED. THE CASES IN 18 HAWAIIAN CONSIDERED.

In neither of the two cases in 18 Hawaiian (*Tax Assessor vs. Laupahoehoe Sugar Company*, 18 Haw. 206, *Income Tax Cases*, 18 Haw. 596), relied upon by the taxpayers, was it held that income is to be taxed in any year other than that in which it is actually received. The question in each of those two cases was simply as to the deductibility of certain expenses in a given year and did not relate to the taxability of income in a given year.

The contention of the Territory is consistent with the decision reached in these two cases. It is believed that they were correct construction of those portions of the tax statutes then before the court for consider-

ation. In each of those cases the income returned was that received by the taxpayer from the sales of movable property, to-wit: its crops of cane and yields of sugar; and the sole question was as to what expenditures were deductible from the gross income received from those sales.

It was held in the one case (*Tax Assessor v. Laupahoehoe Sugar Co.*, *supra*) in which the taxable income was that received during a certain six-months taxation period, that moneys expended prior to that taxation period *in the production of the same sugar* was deductible, and in the other cases, *Income Tax Appeal Cases*, *supra*), in which the taxable income was that received in the year 1906 from the crop of 1906, that moneys paid out in 1906 upon the crop to be harvested in 1908 was not deductible.

Those two decisions were required by the words of the statute. They related to the provision of the statute (now R. L. Sec. 1307) that in taxable income there should be included "the amount of sales of all movable property, less the amount expended in the purchase or production of the same." In each of these cases the taxable income, without dispute was derived from sales of movable property. Under these circumstances, the language of the statute was clear that any amount expended in the production of that movable property should be deducted and equally clear that any amount not expended in the production of that particular property was not deductible under that particular provision.

In the case at bar, however, the moneys received did not come from the sales of movable property whether cane or sugar or anything else. They were therefore,—not falling within any of the other enumerated sources of income in the statute,—properly held to be “other income derived from any source whatsoever,” and taxable for the period in which it was actually received.

Moreover, this court will follow the Territorial court’s construction of these cases, made in the case at bar (Record p. 32).

Territory of Hawaii v. Hutchinson Sugar Co.,
272 Fed. 856, 859.

The various sections of the income tax statutes all consistently provide that income shall be taxable in the year in which it is “derived” or “realized” or “acquired” (these terms are all synonyms,—see *Wilder v. Trust Company*, 20 Haw. 589).

There seems to be no room for argument on this subject. In Section 1306, and 1307, which are the sections directly involved in the case at bar, the provision is that the tax shall be leviable on the net profit or income “derived during each taxation period.” The taxation period is clearly defined in Section 1305, as being “the year immediately preceding the first day of January of each year in which said tax is payable,” and in Sec. 1307 the provision is that “in estimating the gains, profits and income,” there shall be included all income derived from cer-

tain stated sources not now material "and all other gains, profits and income derived from any source whatsoever during said taxation period."

The language is wholly unambiguous; the taxable income is the income derived or received "during each taxation period."

THE DECISIONS OF THE HAWAIIAN COURT HAVE NEVER ESTABLISHED A "CROP SYSTEM" OF ACCOUNTING, AS CONTENTED BY THE TAXPAYER.

That court has not at any time held that income due during the taxation period but not actually received is taxable as income of that year or that income received during the taxation period is not taxable in January or February following, because under the "crop system" or under some other system of bookkeeping the income is treated as income of some earlier or of some later year.

It is respectfully submitted that the language of the United States Supreme Court used in a case where an Insurance company was seeking to have premiums already paid allocated for income tax purposes to different years than that in which the premiums were paid, upon the ground that the premiums were still in the hands of the agents, applies with peculiar force to the present case.

"Only imperative language in the statute would justify a construction which would place it in the power of the claimant, by private contract with its agents, to shift payment of taxes from one taxing year to another."

Maryland Casualty Co. v. United States, 251 U. S. 342, 347.

In the case at bar the taxpayer seeks to shift payment of taxes from one taxing year to another, by a bookkeeping system which would return moneys actually received and available for all corporate purposes in one year, as income for another year. Not only is there no "imperative language in the statute" which would "justify" this attempt, but the wording of the statute is clear that such sums shall be taxed as income for the year in which they are received.

When income is actually received, with liberty for full beneficial enjoyment, it is taxable as income for the year when it is received and cannot be delayed in its payment of the tax in order to conform to some particular system of bookkeeping.

Even if, therefore, it were the fact, as it is not, that the sum of \$133,706.29 was received by the Ewa Plantation Company on December 31, 1920, as a payment in advance for sugar to be produced and sold in 1921, still that would not make that amount non-taxable as income of 1920. The command of the statute would still be imperative, that since the income was received in 1920 it was taxable as income of 1920.

The only question which arises is as to the taxability of income as income of the year in which it was received. It should be borne in mind throughout this portion of the case that the \$2,791,697.72 receiv-

ed by the Ewa Plantation Company was received by it not in payment of movable property which it had sold or expected to sell, but in compensation for its inability to produce property at all or for its inability to produce a portion of its crop at as low a cost as it was accustomed to produce it.

It does not follow at all from the ruling in the two cases in 18 Hawaiian under the particular circumstances of these cases, that certain expenses of a prior period were deductible in a later period, that income actually received in one year is taxable as income of another year. The rulings in 18 Hawaiian were covered by the requirements of the plain language of the statute governing what should be deducted in determining taxable income. The suggestion that income actually received in one year should not be taxable as income of that year, but should be taxed as income of another year, is not only not required by the phrasing of the statute, but would be in absolute violation of the statutory requirement that "there shall be levied, assessed, collected and paid annually * * * a tax of two per cent on the net profit or income above actual operating and business expenses derived during each taxation period * * *" and that in estimating that net profit or income there shall be included "all other gains, profits and income derived from any source whatsoever during said taxation period."

THE TAXPAYER IS ESTOPPED TO CLAIM THAT THE STRIKE CONTRIBUTION IS NOT INCOME FOR 1920, AND TO CLAIM THAT THE "CROP SYSTEM OF ACCOUNTING" APPLIES, FOR IT RETURNED ITS OWN PRO RATA CONTRIBUTION TO THIS VERY FUND AS AN EXPENSE ENTIRELY CHARGEABLE TO 1920.

But there is a further reason why the ruling of the Supreme Court of Hawaii was wholly correct in denying the taxpayer's claim to distribute its reimbursement of strike losses over three annual crops. That is, that the taxpayer in deducting its expenses for the year 1920, deducted *the entire amount of Ewa Plantation Company's pro rata share in the contribution* (Record, p. 4) as an expense chargeable in 1920.

It requires little argument to show that if the strike loss contributions were to be chargeable under the "crop system of accounting" which would appropriate a portion of them to each of three annual crops, that Ewa's share of disbursement as well as its share of receipts should be accounted for in the same manner, and charged proportionately to each of three annual crops.

We submit that the company's own return stamps the claim that the receipts should be apportioned to each of three annual crops as a trifle inconsistent. It is a well-recognized and established rule of tax law, that the taxpayer by the form of his return may estop himself to contradict his return in the nature, title and value of his property.

37 Cyc. 994.

Dull v. Le Fevre, 222 Fed. 471, 474.

In re Bushnell, 215 Fed. 651, 654.

Union School Dist. v. Bishop, 76 Conn. 695, 66 L. R. A. 989.

It is submitted that when the taxpayer characterizes strike contributions *when made by itself*, as being chargeable wholly against the taxable year 1920, and as not being subject to the "crop system of accounting," it is estopped to claim that it should be apportioned to three annual crops, under the "crop system of accounting" and not be chargeable to the taxation period of 1920, *when received by itself*.

The deduction of Ewa contribution was correctly claimed and correctly allowed as a deduction from the income of the year 1920, because it was not paid out as a part of the cost of the production of those three crops, or of any crop or crops and because it was paid out in pursuance with the contract and agreement with the Association as one of the means of obtaining this "other income derived from any source whatsoever," to wit: the sum of \$2,791,697.72.

III.

INTEREST ON MAINLAND INVESTMENTS.

The second point raised by plaintiff-in-error is as to the correctness of the opinion and judgment of the court below on the question as to whether interest received by the plaintiff-in-error during the year 1920 on the bonds and notes of mainland railroad and industrial corporations and upon deposits in mainland banks was or was not legally deductible

in its tax return of 1921 in ascertaining its taxable income. (Record, pp. 33-48). This point is covered by errors assigned and numbered 3-7, 9 and 10. (Record, pp. 80, 81).

The agreed facts showed :

That ever since the incorporation of Ewa Plantation Company, Castle & Cooke, Limited, a Hawaiian corporation, has been its general agent at Honolulu, and for upwards of twenty years last past Welch & Company, a California corporation, has been the agent at San Francisco of said Castle & Cooke, Limited; that at all times during said period the sugar produced by the Ewa Plantation Company has been sold on the mainland of the United States and the proceeds of sale have been received by Welch & Company and deposited by it in California banks, and credited on its books to Castle & Cooke, Limited, for account of Ewa Plantation Company; that against said credit the Ewa Plantation Company has drawn, from time to time as needed, moneys required by it for the payment of expenses of its plantation and dividends upon its stock; that bonds and notes of foreign (mainland) railroad and industrial corporations were purchased by Welch & Company with the surplus moneys of the Ewa Plantation Company so held as aforesaid by the former Company and the said bonds and notes thereafter, until they were sold on the mainland, remained on deposit with said Welch & Company and none of said bonds and notes, or the proceeds with which they were purchased, have

been held in said Territory, nor have they been physically present therein at any time;

That the Ewa Plantation Company after including it in Schedule A of its return deducted the interest accruing to it from these investments during the year 1920 in its Territorial income tax return of 1921, by including it in Schedule B, (Record, pp. 16, 18), and that the Territory, acting through its tax assessor, disallowed such deduction; and

That at no time heretofore has the Territory considered income derived from such investments as taxable income or included such in assessing the incomes of corporations or individuals under the laws of the Territory. The issue raised is: Is interest accruing from such bonds, notes and bank deposits properly deductible prior to arriving at taxable net income under the Territorial Income Tax Act?

CONSTRUCTION OF THE ACT.

As the income in question was not received "from any business, trade, employment or vocation carried on" in Hawaii, the statute may be regarded as though it read, "There should be levied a tax on the income from all property owned in Hawaii." The question then arises as to whether the securities, bonds, notes and bank deposits referred to in the submission are property owned in Hawaii.

It is true that the Territory did not rely before the Supreme Court of Hawaii upon the fact that the wording of the statute refers to the ownership being

in Hawaii rather than the property, but as it is proper that a decision should be supported upon any sound basis, even though the principal upon which it was decided was incorrect, it is deemed proper to urge the point before this court. (*Sullivan v. Iron Silver Mining Co.*, 143 U. S. 431).

The Supreme Court of the Territory of Hawaii (Record, pp. 37, 38), uses the following language on the construction of the word "owned":

"At the very outset counsel for the Territory concede that the phrase 'owned in Hawaii' as employed in Section 1306 must be taken as referring to the property and not the owner and the final form of the question is, 'Are these bonds and deposits in Hawaii,' and that 'the case stands as though the statute read "income from property in Hawaii owned by the taxpayer.'" We are not as ready as counsel to accept this construction of the meaning of the statute. It seems to us that it could be strongly argued that the phrase 'property owned in Hawaii' has reference to the place of ownership and not to the location of the property. We are referred to the rule that in the construction of a statute the language employed should be taken in its common and usual significance and we are reminded that if a person were asked, 'What property do you own in the Territory?' he would not in answering enumerate bonds and notes of foreign or mainland corporations or deposits in foreign or mainland banks. This may be true, but on the other hand if the San Francisco agents of these corporations were asked in respect to the property in question, 'Where are these bonds, notes or bank credits owned?' the answer obviously would be, 'In the Territory of Hawaii,' and that answer would be entirely correct."

It is submitted that under the authorities already cited to the Court the construction by the local Court of the local statute and its meaning is entitled to the greatest possible weight. If this construction be adopted, of course the question is solved at once favorably to the Territory.

But it is not alone upon the language of the Hawaiian court that the Territory depends. The California court—and we respectfully request that this court have in mind when California cases are cited that the taxpayers are attempting to establish a taxable situs for the securities in California rather than in Hawaii—has defined securities even though physically absent from a State as “owned” in the place where the owner resides.

Estate of Fair, 128 Cal., 607, 613.

Hunter v. Board of Supervisors, 33 Io. 376, 378.

Shares of stock, in the absence of legislation prescribing a different rule are appropriately related to the person of the owner.

Hawley v. Malden, 232 U. S. 1, 12.

It is submitted that there is no straining of language or of the intent of the Legislature in holding that the term “owned in” referred to the concept of ownership of intangibles as following the locality of the person of the owner.

In Section 1305, R. L. 1915, the Legislature has provided for a levy and assessment of a tax on income derived “by every person residing without the Territory from all property owned * * * in the Territory.” The argument is made that this conclusive-

ly indicates the intention of the Legislature that property must be physically present in Hawaii before it can be regarded as owned in Hawaii. We submit that this is not necessarily so, that the same distinction might be made properly on the statute in regard to non-residents that the Territory claims in regard to the corporations, namely, that in regard to tangible property, whether real or personal, within the territorial limits of Hawaii, the income therefrom must be taxed by the Territorial Government, whereas, as to intangibles they follow the person of the non-resident owner.

In this connection the Territory desires to call attention to the case of *Rhodes vs. Weldy*, 46 Ohio St., 234; 15 American State Reports, 584, 591, 592, cited by plaintiff-in-error. There the holding of the court was not, as cited by the plaintiff-in-error, that the meaning of language used in statutes should be construed to be the same wherever used. Indeed the court said specifically:

“It would not be a sound proposition to say that the same word occurring in different places in the same statute always means the same thing. It may sometimes call for a radically different construction.”

But the Territory does not ask for a radically different construction of the words “owned in” in Sections 1305 and 1306 of the Revised Statutes; it asks for a harmonious construction which shall declare that while tangible property of all sorts is “in” the place where it is physically found that the situs of intangibles follows the person of the owner.

Again adopting that rule of construction which is specifically required in the Courts of Hawaii, R. L. 1915, Section 11:

"Laws in pari materia or upon the same subject matter must be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."

We have the following explanation of what the Legislature intended that corporate income to include. Section 1305 and 1306 provide whose income shall be taxed and the general broad classifications of the sources from which that income shall come. Section 1307 then goes on to explain in greater detail how the income shall be estimated. Reading Secs. 1305 and 1306 the other side asks, does that include bonds and other securities in a case where, although the owners are residents of Hawaii, the papers are on the mainland? The precise answer to this very question is given in Sec. 1307. That Section says that "in estimating * * * the income of any person or corporation *there shall be included all income derived from interest upon notes, bonds and other securities*, except such bonds of the Territory of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempted from all taxation." The exception stated, of course, does not apply to the case at bar. The naming of one exception, however, does serve to show that no other exception was intended by the legislature. *Enumeratio unius exclusio alterius.* What could be clearer? The legisla-

ture itself, anticipating that questions might arise as to the construction of some of the provisions of the earlier sections, proceeded to give answers to some at least of these questions. It said in unambiguous language that there "*shall be included*" *all* income in Hawaii derived from interest upon notes, bonds and other securities. That means, if it means anything at all, that interest upon all notes and upon all bonds and upon all other securities (excepting those which are specifically excepted) is taxed. We are not asking the court to find in Section 1307 that things are taxed which are not taxed under Sec. 1305 or under Sec. 1306. It is entirely proper for the Legislature to use two sections to express its thought, instead of using one only; just as it is entirely proper for a person to use two or more sentences to express his thought instead of endeavoring to confine himself to one sentence. In stating his meaning a man may use more words rather than fewer words, if he deems it necessary. It is often as difficult for a legislature, as it is for an individual, to express its whole thought in all of its details in one sentence or in one paragraph. It may deem it necessary to use two or more paragraphs or two or more sections. Read as we submit it should be read, there is no inconsistency between Secs. 1306 and 1307; nor is there any enlargement of Sec. 1306 by Sec. 1307. In the case of *Frear vs. Wilder*, 25 Haw. 603, the court found that the reference to gifts in Sec. 1307 would be an enlargement of Sec. 1305, and

that the imposition of the tax was accomplished by Sec. 1305 alone and could not be enlarged by Sec. 1307. The use which we ask to be made of Sec. 1307 in construing Sec. 1306 is not inconsistent with the decision of the court in the Frear case. The language of Sec. 1306, all "property in Hawaii," is broad enough to include the intangible credits under consideration (the owner being domiciled in Hawaii) as well as to include real estate, railroad cars, horses and other tangible personal property physically in the Territory. And if in Sec. 1307 the legislature has given us direct light upon the very question which arises in this case as to whether these bonds and other securities are meant to be included as property in Hawaii, should our eyes be shut to that light? Why should it not be gladly welcomed by the court as rendering its task easier? The catch words adopted by the legislature for the beginning of the section are, "**INCOME INCLUDES WHAT**". What income? Can there be any doubt about it? Why, certainly, the income which is taxed by Sections 1305 and 1306. And, again, the legislature says that these things which it is about to enumerate in Sec. 1307 shall be included,—when and under what circumstances? Clearly, "in estimating the income," that same income referred to in Sections 1305 and 1306. The legislature has said it. Why should we refuse to heed it? What corporations did it mean? The corporations referred to in Sec. 1305. What gains, profits and income did it mean? The gains,

profits and income of the persons referred to in Sec. 1305 and of the corporations referred to in Sec. 1306. What room is there to doubt this? How can it be said that by reading Sec. 1307 and by absorbing the light which it gives we are enlarging Secs. 1305 and 1306 and taxing something which the two earlier sections do not tax? It is submitted that such a charge would have no foundation.

If, instead of following the method which it has followed, the legislature had added at the end of the first paragraph of Sec. 1305 and again just before the word "provided" in the middle of Sec. 1306 the following words: "In estimating the gains, profits and income which we are in this paragraph talking about we mean that there shall be included all income derived from interest upon all notes, bonds or other securities except those issued by our Territory or its municipalities," could it be successfully argued for a moment that this addendum in each section could not serve to explain the meaning of the preceding words or to show that the legislature did mean to tax all bonds and securities wherever the physical evidences thereof were situated? Such a position would be altogether untenable, it is respectfully submitted. What difference can it make whether the explanatory words appear in another section instead of in the same section? All writers upon analogous subjects would say that it makes no difference. In other words Sec. 1307 is to the extent here mentioned the legislature's own dictionary of the

language which it has used in Sec. 1305 and 1306. It had a right to use such a dictionary and to furnish it in advance to all litigants and to all courts.

THE LEGISLATIVE INTENT

Plaintiff-in-error has called upon the rule of construction that tax statutes shall be strictly construed against the government. While that is true as a general proposition, it is not recognized as extending to a point where the intention of the legislature should be perverted in order to exempt a large class of property from taxation.

“It may be conceded that no tax can be levied without express authority of the law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intention.”

Scottish Union and Nat. Ins. Co. vs. Bowland,
196 U. S., 611, 629.

It is an old and well-recognized rule of construction that the intent of a legislature shall be controlling upon the courts in construing statutes. This rule is adopted for Hawaii by Section 12, R. L. 1915:

“One of the most effectual ways of discovering the true meaning of the law when its expressions are dubious is by considering the reason and spirit of it or the cause which induced the legislature to enact it.”

On the purpose of the law and the intention of the legislature in enacting it, we feel that the Territory's position can be most lucidly expressed in the language of a Federal case. The citation of this authority is the more satisfactory, as plaintiff-in-error accepts it unquestioningly:

"Great weight and due deference is always given to departmental or other executive construction of laws. The acceptance of such construction is, however, always limited by the thought that the imposition of a tax is a legislative and not an executive act, and we are brought back again to the judicial construction of the statute. *A like observation may be made with respect to the thought that Congress must have intended this law to yield revenue, and because of this should be given such a construction as will advance the purpose and not nullify it.*"

De Ganay v. Lederer, 239 Fed. 571-2.

"The law should be construed as a whole in order to determine the intention of the legislature—the real end sought in all interpretation of statutes."

Assessor v. Oahu College, 15 Haw 18.

STATUTES IN PARI MATERIA.

Plaintiff-in-error, on page 37 of its brief, has attempted to construe the taxation statute as applying only to personal property, the physical evidences of which are in the Territory, by calling in aid Section 6, R. L. 1915, providing that the property of all such persons, while such property is in the Territorial jurisdiction of this Territory, is also subject to the laws.

Counsel contend that Territorial jurisdiction refers to physical boundaries rather than the power and dominion of law jurisdiction, and thus attempt to restrict the operation of a tax law to property physically within that physical boundary of the Territory.

Counsel argue in a circle. Even accepting their construction of Section 6 as referring to physical

boundary of the Territory, there still remains the question as to whether intangible property in theory of law so follows the person of the owner as to be within the physical boundary of the owner's residence.

"It has always been the primary and fundamental rule that no sovereignty or taxing district could exercise the power of taxation, except as to property actually or constructively within its jurisdiction * * *. Our Constitution, therefore, in declaring that property shall be taxed *where situated* has done no more than declare the common law rule. The purpose of the Constitution in declaring that property should be taxed in the country *where situated* was really to define the general jurisdiction unit for the exercise of the taxing power, and to confine the exercise of that power to the subjects of taxation within that unit. It did not define what was meant by the words 'where situated'. Since it had reference to the taxing power, it evidently meant property *where situated* for the purposes of taxation under the general principles of law as then understood. *County Treasurer v. Webb & Harrison*, 11 Minn. 500; *San Francisco v. Lux*, 64 Cal. 481; *Johnson v. Oregon*, 2 Or. 327; *San Francisco v. Mackey*, 22 Fed. 602, 607."

Great Southern Life Ins. Co. v. Austin, Tex.,
243 S. W. 778, 780.

Westinghouse Electric & Mfg. Co. v. Los Angeles County, Cal., 205 Pac. 1076.

But the construction by the Hawaiian court of this statute (Section 6) affords no support to plaintiff-in-error, for in *Carter v. the Insurance Co.*, 10 Haw. 562, 570, the court indicated that Mrs. McGrew, although physically present in California, was within the Territorial jurisdiction of Hawaii by virtue of her husband's domicile.

CONTEMPORANEOUS CONSTRUCTION

It has never been questioned by the Territory that the construction by executive officers of a law is entitled to respectful consideration, but it is denied that such a construction is controlling. At page 47, Record, the Supreme Court of the Territory says:

“But the rule which gives determining weight to contemporaneous construction put upon the statute by those charged with its execution applies only in cases of doubt and ambiguity. Courts will ordinarily make use of the contemporaneous construction of a statute by executive and administrative officials as an aid to interpretation, but an erroneous construction can never be binding on the judiciary.”

Where exemptions are claimed, the omissions of the taxing officers of a state in previous years to assess the property cannot control the duty imposed by law upon their successors, or the power of the legislature or the legal construction of the statute under which the exemption is claimed.

Vicksburg, Etc., R. Co. v. Dennis, 116 U. S. 665, 670.

Yazoo Ry. Co. v. Thomas, 132 U. S. 174, 185.

Wells v. Savannah, 181 U. S., 531.

THE EARLY HAWAIIAN CASES ON THE TAXATION OF PERSONALTY.

In the case of *H. Hackfeld & Co.* 3 Haw. 292, the question was whether money and merchandise which were actually in the United States and Europe were taxed by the statute of Hawaii. The statute under consideration was that imposing a direct tax upon personal property and it was held not to include

within its terms tangible personal property (money and merchandise) which were in the United States and Europe. The statute there under consideration was sufficiently clear in its language to show that the intention of the legislature was to exclude money and merchandise not within the Territory. For example, it taxed only those moneys which were "in hand." It did not even tax moneys in a bank in Hawaii, let alone moneys in Europe. The decision was doubtless correct in so far as the precise question before the Court is concerned; but when the Court said that the maxim as to the situs following the owner "cannot become fact as applicable to taxation, except by legislative enactment," the statement was not required by the facts of the case, (because in that particular case there was a statute which, as construed by the Court, prevented the application of the maxim) was in other words *obiter dictum* and was certainly contrary to all of the reported cases that we know of. Not even the cases cited by plaintiff-in-error go as far as to say that the maxim or principle cannot be adopted in any case except by legislative enactment. As appears from the quotations hereafter made there are too many rulings of the Supreme Court of the United States and of other courts to the contrary to permit the statement from 3 Haw. 292, 295, just referred to, to stand as a correct enunciation of the law.

The statement quoted in the taxpayer's brief from 3 Haw. 297 was made by one only of the justices. As

above stated, the only property under consideration in that case was money and goods which were in the United States and Europe. What Mr. Justice Hartwell said relating to household furniture, family relics and non-negotiable notes and securities, was clearly *obiter dictum*. Not only was his statement not an announcement of the view of the full court, but it has not the force of even an actual decision or actual opinion by one justice.

The other Hawaiian case cited on the subject is that of *Hackfeld vs. Lucc*, 4 Haw. 172. In that case the statute imposed a tax on "all personal property of whatever kind" and, as the court said, "the same section proceeds to illustrate what is personal estate, as follows:

"The term personal property shall be construed to include all household furniture, goods and chattels, wares and merchandise, all ships and vessels, whether at home or abroad, all moneys, *notes of hand, unsecured debts*, growing crops, public stocks, stocks in corporations, and every species of property not included in real estate." The court said that "though a personal tax cannot be assessed against a non-resident, nor can the property of a non-resident be taxed unless it has an actual situs within the jurisdiction, so as to be under the protection of its laws, it is quite competent for any government to provide that any tangible personal property situated within its jurisdiction may be taxed there irrespective of the residence of the owner."

With this statement of principles no fault it is to be found. As has been above stated, the State can reach the tangibles within its Territorial limits whether the owner be a resident or a non-resident

and can also tax a resident and measure his ability to pay by the income which he receives from property elsewhere. The court held that certain debts payable to residents, secured by mortgages on real and personal property in the kingdom, and also certain other debts payable to persons not resident in this kingdom for which non-residents the local taxpayers were agents, some of which latter securities ran in the name of the local taxpayers themselves though held for account of their absent principals, were personal property within the kingdom. As to the debts due to Hackfeld & Co., the local taxpayers, there could have been no doubt whatever that they were personality in Hawaii and taxable here. As to the securities held by Hackfeld & Co., as agents for the persons in Germany the court ruled that the language of the then existing statute was such as to show that the legislature intended to tax those also; and in doing so held that the maxim *mobilia sequuntur personam* could be departed from. If by that reasoning the court meant that the maxim could be applied or disregarded in the *sole discretion of the Court*, it is submitted that the ruling was against the great weight of authority and against the view of the Supreme Court of the United States as quoted in this brief. If, on the other hand, by that reasoning the court meant that our statute, as construed by it impliedly repealed the maxim for the purposes of the taxation thereby imposed, the ruling is one that is immaterial in the case at bar. Each statute

has to be considered upon its own merits and with reference to its application to the particular state of facts in hand.

The court said, among other things: "It is true that the mere right of a foreign creditor to receive from his debtor within the state, payment of his demand cannot be subjected to taxation, for this is a right personal to the creditor where he resides. The creditor cannot be taxed in the debtor's hands for they are not his property in any sense. They are the obligations of the debtors and possess value only in the hands of the creditors." But the creditors in the cases at bar are within the jurisdiction and can be taxed. They receive from the Territory security and protection. They can properly be called upon to help bear the expenses of government.

The decision in the *Estate of Hall*, 19 Haw. 531, related to inheritance taxes and the applicability of the maxim was not there in issue. "The fiction that personal property has its situs at the domicile of the owner *is not relied on*, as it is conceded that the act covers personal property of a non-resident which is tangible and is physically situated within the Territory." Page 533. The description in the act of the property thereby made taxable included "all personal property within or without the Territory." The court held that this description "includes intangible as well as tangible property" and certainly the expression "within or without the Territory" was unambiguous and left no room for construction.

THIS COURT WILL FOLLOW THE INTERPRETATION PLACED BY THE SUPREME COURT OF THE TERRITORY ON THE DECISIONS OF THE SUPREME COURT OF THE HAWAIIAN ISLANDS.

But there is a further reason for this Court to hold that the cases of *Hackfeld & Co. v. Minister of Finance*, 3 Haw. 292, and *Hackfeld & Co. v. Luce*, 4 Haw. 172, and *Estate of Hall*, 19 Haw. 531, did not reject the maxim *mobilia sequuntur personam* as a principle of law. The Supreme Court of the Territory, in the case at bar, interpreted the decisions in those cases in the following language: (Record, p. 46).

"The further point is made by counsel for the taxpayers that the local Supreme Court in the three Hawaiian cases *supra* has repudiated entirely the maxim *mobilia sequuntur personam*, but with this we cannot agree. Some of the expressions made use of would perhaps lead to that inference, but after a careful review of those opinions, taken in the light of the law and facts involved, we conclude that the most that ought to be said of them is that the Court merely intended to hold, as the Supreme Court of the United States has since held in *Maguire v. Treffry*, *supra*, that the maxim is not of universal application and may yield to the exigencies of particular circumstances."

As this court will consider the interpretation by the Supreme Court of the Territory of the decisions of the Supreme Court of the Hawaiian Islands binding upon the Federal Court, the foregoing discussion by the Supreme Court of the Territory of those

earlier Hawaiian cases should be conclusive in this cause of the intent and purpose of the Supreme Court of the Kingdom in the language used in those early cases.

"The appellant and the appellee differ as to the purport and meaning of these two decisions of the Supreme Court of the Hawaiian Islands, but we consider the decision of the Supreme Court of the Territory in the case at bar a final determination of the law of the Territory which is binding on this Court."

Territory of Hawaii v. Hutchinson Sugar Co.,
272 Fed. 856, 859.

COMPARISON WITH OTHER LEGISLATION.

Intangibles have been considered appropriately taxed under a provision for taxation of such property "in" the state, even when physically absent, in many of the states.

Westinghouse Electric & Mfg. Co. v. Los Angeles, Cal., 205, Pac. 1076.

Dwinnell v. Gaylord, 73 Wis. 316.

Anderson v. Durr, Ohio, 126 N. E. 57, aff'd on certiorari (U. S.) Adv. Ops., 42 Sup. Ct. 15.

THE MAXIM MOBILIA SEQUUNTUR PERSONAM APPLIES TO TAXATION OF INTANGIBLE PERSONALTY IN THE ABSENCE OF LEGISLATION PRESCRIBING A CONTRARY RULE.

The maxim *mobilia sequuntur personam* is a familiar one. It has been recognized and applied by courts and text-writers so long that the memory of man runneth not to the contrary. It means that movables follow the owner, that personalty is to be

deemed to have its situs at the domicile of the owner, that it is to be deemed to be at the owner's domicile. Bonds, notes and bank deposits are credits in the hands of the owner, or depositor, as the case may be. The transactions disclosed by the existence of a bond, note or of a bank deposit are simply loans made by the holder or depositor to the entity issuing the bond or note in the one case, and to the bank in the other case. From these transactions credits arise which are property in the hands of the creditor and not of the debtor. If the papers, which we call bonds and notes, are burned or otherwise destroyed, the credits are not destroyed. They still continue in existence and enforceable in favor of the creditor. If the certificate of deposit or the bank book, if there is any, is burned or otherwise destroyed, the credit in favor of the depositor continues to exist and to be enforceable. In the event of the destruction or loss of the papers, the kind of evidence to be resorted to in order to prove the existence of the credit may be different. It may be what lawyers call secondary evidence, but the credit will nevertheless be provable and in existence. The bonds and the bank book or certificates, when they are used, are merely one form of evidence of the fact and the existence of the credits. These credits being intangible have no actual visible situs of their own. The maxim, which sometimes is called a fiction, is peculiarly appropriate in such a case. The credit would naturally be thought of as having its existence with the creditor.

at his domicile. At the other end, with the debtor, is simply the debt, and the debt is not property in any proper sense of the term.

If this maxim applies in the case at bar, the bonds, notes and the deposits under consideration are property in Hawaii. But the taxpayer says that it should not be applied in this case because, as it says, it was intended to effectuate justice and is generally disregarded in taxation matters. Its whole brief seems to be based upon this theory and the claim that after a considerable history of gradual, judicial development or curtailment,—whichever may be the proper term—the maxim is now generally disregarded *by courts at their option* in taxation matters. We respectfully take issue directly with the thought and the contention that *courts* are at liberty to apply or to refuse to apply the maxim in taxation matters in their discretion, and submit that in the absence of legislation to the contrary the maxim *must* be applied. There are, indeed, some cases which support the contention of opposing counsel upon this particular point; but it is submitted that the weight of authority and of reason is the other way. The maxim is a principle or rule of law and has been often so referred to by courts. A few examples will be here given.

“This objection is based upon the general rule of law that personal property, as to its situs, follows the domicile of its owner.”

Taylor v. Secor, 92 U. S. 575.

In the same page and paragraph of the case just cited, the court refers to it as a *law*:

"Like all other *laws* of a state, it is therefore subject to legislative repeal, modification or limitation."

Cooley speaks of the maxim as a general rule. Cooley's Taxation (1876), pages 269, 270. So does the Court in

Providence Institution v. Boston, 101 Mass. 575, 582.

Danville v. Parks, 88 Ill. 170, 173.

New Orleans v. Stempel, 175 U. S. 309, 313.

Pullman Company v. Pa., 141 U. S. 19, 27.

Neither in matters of taxation nor in any other class of cases should it be left to the discretion of courts to apply or to brush aside this principle. In matters of taxation the result would be that it would be left to the courts to decide, as did the court in *Poppleton v. Yanhill*, 18 Or. 377, 382, whether the imposition of a tax upon certain classes of property would be just or unjust. "I can discover no justice whatever" in the alleged taxation, said the judge in that case; and for that reason the maxim was there disregarded. Economists and other able-minded men often differ as to the harshness and injustice or the justice of certain tax laws. If those laws do not violate certain constitutional limitations upon the power of the state, the courts have uniformly held that the laws are valid and that it is for the Legislature alone to say whether it shall tax doubly, for example, or with some degree of harshness or severity or whether it shall make certain broad classifica-

tions of the subjects of taxation, leaving out others from the operation of the tax. Questions such as these are always for the Legislature alone and not for the courts to determine. The maxim has been too long recognized as a principle of law to be now disregarded in the absence of a legislative command.

"Personal property, in the absence of any *law* to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purposes of taxation, it *may* be separated from him and he may be taxed on its account at the place where it is actually located. These are familiar principles and have been often acted upon in this Court and in the Courts of Illinois."

Tappan v. Merchants' National Bank, 19 Wall 490, 499.

Here is a statement, directly upon the point, by the highest court in our land. The word "law" there used is unambiguous. It means a law passed by the legislature. If there is no such law to the contrary the court says personal property does follow the person of the owner and does have its situs at his domicile. And when the court says that for purposes of taxation it may be separated from him and may be taxed, the court, of course, means that it may be separated by the legislature. "There is no doubt of the *legislative* power to modify the rule of comity, *mobilia personam sequuntur*, in many respects." *New Orleans v. Stempel*, 175 U. S. 309, 313. Why talk about legislative power if the courts of themselves can adopt or reject the rule as they please?

Referring to this rule,

"Like all other laws of a state, it is, therefore, subject to *legislative* repeal, modification or limitation; and when the Legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated the rule of uniformity prescribed by the constitution of the state, we will consider when we come to the constitutional objections to the statute."

Taylor v. Secor, 92 U. S. 575.

The same comment applies here as was made with reference to the last case. It is to be further noted from this quotation from the Taylor case that the legislature may desire to leave the maxim intact as to certain matters of taxation and to repeal it or modify it as to certain other matters of taxation, as was done by the legislature of Illinois in the Taylor case.

"But, for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner *by the law of the place where it is found*."

Pullman v. Pa., 141 U. S. 19, 29.

To the same effect is *Marye v. Railroad*, 127 U. S. 117, 123.

In *Bristol v. Washington County*, 177 U. S. 133, 144, the court quoted with approval the statement from *New Orleans v. Stempel*, supra, that the *law* might separate shares of stock from the persons of their owners for purposes of taxation and give them a situs of their own.

Cooley (*Taxation*, 2nd Ed., page 23) says that "the state may give the shares of stock held by individual stockholders a special or particular situs for the purposes of taxation and may provide special modes for the collection of the tax levied thereon" and that "it is often convenient as well as perfectly just to take that course."

He certainly means that the state, through the *legislative* instrumentality, may do these things. It is for the state and not the courts, we submit, to say in any particular case whether it is "convenient as well as perfectly just" to repeal or to modify the principle.

"Since shares of stock in a corporation in the hands of the individual stockholders are personal property, even when the corporation owns land, their situs for the purposes of taxation is the residence of the owners or holders within or without the state, as the case may be, *unless there is express statutory provision to the contrary.*"

7 Fletcher Cyc. Corp., Sec. 4623.

Speaking of a share of stock,

"It is of that class of property that its situs for purposes of taxation is a matter of *legislative control.*"

Denver v. Hobbs Est., 58 Colo. 220, 224.

After discussing the nature of a share in a corporation,

"From this it would seem to result necessarily, *that its situs, for purposes of taxation, when not otherwise provided by statute, is that of the domicile of the owner.* That shares of stock may be separated from the person of the owner, *by statute*, and given a situs of their own was held in *Tappan v. Merchants'*

Bank, 19 Wall. 490. *But when not so separated, that their situs follows and adheres to the domicile of the owner* is supported by a great weight of authority.

* * * * *

“The same principle governs a chose in action for purposes of taxation. Its situs is that of the domicile of the owner, although the debt is secured by a mortgage upon the realty in another state.”

Bradley v. Bauder, 36 O. St. 28, 35, 36.

Referring to bonds and notes,

“Such mere credits have no other situs than the domicile of the owner, unless made so by statute * * *. When, as here, there is an absence of any statute prescribing a different rule * * * the debt has its situs at the residence of the creditor and may be taxed there. This ruling is certainly supported by the great weight of authority.”

Dwinnell v. Gaylord, 73 Wis. 316, 324, 325.

“Intangible property, like stock, must always follow the domicile, unless separated from it by positive law.”

Howell v. Cassopolis, 35 Mich. 471, 473, 474.

“A share of stock in a corporation is personal estate and in the absence of any statute to the contrary is taxable to the owner as other personal estate, at the place of his residence, whether the corporation be foreign or domestic.”

Greenleaf v. Board, 184 Ill. 226, 228.

“The situs of such intangible property as shares of stock is the residence of the owner, when the contrary is not declared by statute.”

Ogd'n v. St. Joseph, 90 Mo. 522, 529.

To the same effect are *Providence Institution v. Boston*, 101 Mass. 575, 582; and *Danville v. Parks*, 88 Ill. 170, 173.

The later Kansas cases—which repudiate the early rule set forth in the Kansas cases cited by plaintiff-in-error—accept this doctrine of the law.

“In the absence of specific legislation, debts evidenced by notes and mortgages are ordinarily taxed at the domicile of the owner.”

Kimball Co. v. Shawnee County, 99 Kan. 302.

Freedom Twp. v. Douglas, 99 Kan. 176.

It is submitted that the principle in question must be applied in this case unless there is a statute to the contrary. Hawaii has no statute expressly saying that the maxim is not law here either with reference to taxation matters or to any other subject. Nor have we any statute indirectly making this declaration, unless it be the very tax statute now under consideration. The latter, it is submitted, has no such provision and can have no such effect. The expression, *property in Hawaii*, in Secs. 1305 and 1306 is capable of including everything that is property in Hawaii because it is *physically* here and everything that is property in Hawaii by virtue of the maxim,—subject only to the limitations of Hawaii’s taxing power.

IN ANY CASE NO BUSINESS SITUS OF THE INTANGIBLES IN THE INSTANT CASE IS SHOWN OUTSIDE OF THE TERRITORY.

But if this Court feels that the maxim *mobilia sequuntur personam* may be rejected in any given case, if a “business situs” is established for securities in a state apart from the residence of the own-

er, it is submitted on behalf of the Territory that the decision of the Supreme Court of the Territory of Hawaii was still correct, for no business situs in California was established for these securities.

In the event of failure to establish a business situs elsewhere, personal property, whether tangible or intangible, has its situs at the domicile of the owner.

Anderson v. Durr, Adv. Ops., 42 Sup. Ct. 15, 17.

In order then to justify plaintiff-in-error's claim that these securities (bonds, notes, and bank deposits) are exempt from taxation under the Hawaiian taxing statute, they must be shown to have established a business situs outside of the Territory of Hawaii, that is, in California, where the evidences of the debt were physically present. The Territory does not for an instant admit that even were such business situs established, that these securities would be relieved from the operation of the Hawaiian statute (*Anderson v. Durr*, supra), but it is urged that if such situs is not established, the case of the plaintiff-in-error must necessarily fail.

It is proper then at the outset to inquire what characteristics marked the physical presence of these securities in California that would justify a declaration that they had acquired a business situs in that state; and further what circumstances in connection with mere physical presence of intangibles in a state other than that of the owner's domicile constitutes a business situs.

THE CIRCUMSTANCES CHARACTERIZING THE PRESENCE OF THE INTANGIBLE PROPERTY IN QUESTION IN CALIFORNIA.

The submission (Record, p. 7-8) shows that Ewa Plantation Co. has a general agent in Honolulu, and that this general agent has in turn an agent, Welch & Co., in San Francisco. That Welch & Co. has during twenty years received the money paid for Ewa Plantation Co.'s sugar, which is sold on the mainland, and has deposited this money in California banks, crediting the amount on its books to the Honolulu agent for account of Ewa Plantation Company. That Ewa Plantation Co. has drawn from time to time against this credit as needed moneys required by it for the payment of the expenses of its plantation and dividends upon its stock; that all the bonds and notes were purchased by Welch & Co. for the account of Ewa Plantation Co. with surplus moneys of the latter so held, and the bonds and notes until they were sold on the mainland, *remained on deposit* with said Welch & Co. and none of said bonds and notes, or the proceeds with which they were purchased have been held in the Territory of Hawaii, nor have they been physically present therein at any time. Exhibit "B" (Record, p. 23) shows what these securities were, and the income from the bank deposits.

What are the significant things in this statement of facts? There is much that has no bearing on the matter at issue and is confusing so that should be

rejected at once. The receipt and disposition of the funds resulting from the sale of the sugar cannot qualify the agency regarding the notes, bonds, and deposits, for those funds being the proceeds from the sale of movable property (sugar) produced in Hawaii were subject to the income tax; and this has not been questioned. The drawing by Ewa Plantation Co. against the credit described above *may* be significant as bearing upon the business situs of the bank deposits. But the two vitally significant matters of fact in the submission are, first, the simple purchase by Welch & Co. of the bonds and notes in question, and the deposit of these securities with them until sold; and, second, the fact that the deposits in the California banks *must* have been in the name of Ewa Plantation Co. If they had not been, they would have been returned by the tax-payer, not as deposits in the Canadian Bank of Commerce and in the Wells Fargo Nevada National Bank (Record, p. 23), but as credits with Welch & Company.

What then was the control over these securities by the California agent of Ewa? First, it must be noted that Welch & Company was an "agent," not a "general agent," as was Castle & Cooke, Limited, in Honolulu (Record, p. 7); second, funds were deposited in California banks (credited on the books of Welch & Co. to Castle & Cooke, Ltd., for account of Ewa), apparently, from Exhibit "B," (Record, p. 23) in the name of Ewa, and against this credit, Ewa drew whenever it needed funds; third, the bonds and

notes were purchased by Welch & Co. for Ewa—possibly upon the most specific and minute directions—and remained on deposit with Welch & Co. until sold (it does not appear through whom).

It is urged that here is no showing of any but the most limited agency in respect of these securities. The taxpayer, it must be presumed, has stated its case as strongly as possible in this respect in the Submission. It says that it had an agent in Honolulu, Castle & Cooke; that Castle & Cooke had Welch & Co. in San Francisco as its agent; that the sugar produced by the taxpayer has during the period referred to been sold on the mainland and the proceeds have been received by this California agent and credited on its books, "to Castle & Cooke, Limited, for account of said Ewa Plantation Co.," and that "against * * * said credit" the taxpayer "has drawn from time to time as needed moneys required by it for the payment of the expenses of its plantation and dividends upon its stock"; that the bonds, and notes were purchased by the agents "for the account of" the taxpayer "with surplus moneys of the latter so held" by the agent; that the bonds and notes thereafter, until they were sold on the mainland, "remained on deposit" with the agent "and none of said bonds or notes or the proceeds from which they were purchased have been held in said Territory nor have they been physically present therein at any time." Not a word is said in the submission about the existence of a power of attorney. The presump-

tion under the circumstances must be that there was none. Not a word is said in the submission as to any power, even orally or by informal writing communicated by the taxpayer to the San Francisco agent, having been vested in the latter to do anything other than to purchase the bonds and to hold them subject to the order of the taxpayer in Hawaii. Nowhere does it appear that any power was given to the San Francisco agent to invest or to reinvest or to purchase or to sell without the direct command or prior approval of the Hawaiian owner, or even to collect the interest thereon. On the contrary, it does appear expressly that these moneys, as *written on the books of the San Francisco agent*, were held not to the credit of the agent, but to the credit of the Hawaiian taxpayer. It further appears expressly that these moneys so credited in San Francisco in the very name of the Hawaiian taxpayer were drawn upon by the taxpayer itself, and not even by Castle & Cooke in Honolulu. All this means, if it means anything, that the Hawaiian taxpayer throughout the whole of the period in question retained a very direct and complete control of these credits and securities *in itself* in Hawaii.

It matters not how long the arm is which reaches out from the place where the owner is and which holds the credits or securities. It matters not whether the securities are in a room adjoining that in which the owner is or are (the owner being in Honolulu) in Hilo or are in California. If discretion ex-

ists at all in the court to depart from the maxim that intangibles are where the owner resides, then certainly the fact that the owner retains a very real and complete control of his intangibles, allowing his agents no discretion in the matter, should prove to be a controlling factor. Suppose, for example, that the physical evidence of these credits (bonds and notes) are in the safe deposit box of the Trent Trust Company on Fort Street in Honolulu, the owner doing business on Hotel Street and retaining the only key to the box. His control is complete. Suppose that, instead of being in the Trent Trust Company's box, the securities, with the owner in Honolulu, are in a box of a safe deposit company in San Francisco with the only key in the possession of the owner in Honolulu. The control would be no different. Suppose that in the last case the key is in the hands of an agent in San Francisco with instructions to do with the securities only as the owner shall dictate. That control is still the same in principle. And lastly, it can make no difference that the bonds are in the offices of the agent himself and not in those of a safe deposit company in San Francisco.

The submission says that the bonds and notes were purchased by the San Francisco agent for the account of the taxpayer, but it does not say that the agent in San Francisco ventured to make these purchases or did make them without the direct instructions of the taxpayer. The submission does say that the bonds and notes were all of the time physically

in the possession of the San Francisco agent, but it does not say that this agent had any power over them, except to protect them physically.

The application of the maxim is peculiarly appropriate in the case at bar. The deposits in the bank are not shown to have been physically evidenced in any way, but, even assuming that they were, neither they nor the credits which were evidenced by the papers called bonds had in themselves any physical existence. They are intangible things. The money itself which was deposited became the property of the bank. The transactions in those cases were in effect loans to the bank. The lenders thereafter held mere credits. Those deposits certainly have no actual situs anywhere. The maxim very properly says that they must be deemed to be where the owner has his domicile. The case of the bonds is but little different. The mere presence of physical papers in San Francisco, under the circumstances above enumerated, is insufficient to give the credits a locality there. Suppose the bonds were all burned or otherwise destroyed thereafter, they would have no physical being of any kind. Would the maxim not apply one day and apply the next? Suppose that one-half of the bonds were burned and that one-half were not burned. Would the maxim apply as to one-half and not as to the other? Or would the taxpayer in those cases invent another maxim or fiction that "once in San Francisco, always in San Francisco?" This analysis shows that the taxpayer's contention is un-

tenable and that the enforcement of the maxim is most appropriate in the case at bar.

THE SECURITIES IN QUESTION HAD NOT ACQUIRED A BUSINESS SITUS FOR PURPOSES OF TAXATION IN THE STATE OF CALIFORNIA, AND THEREFORE THEIR ONLY SITUS WAS AT THE OWNER'S DOMICIL IN HAWAII.

Even though the securities in question had acquired a business situs in California, such as would render them liable to taxation there, still that would not deprive the Hawaiian Government of jurisdiction to tax their income here, as income arising from property "in" Hawaii.

Anderson v. Durr, supra.

Union Transit Co. v. Kentucky, 199 U. S. 194.

Hawley v. Malden, supra.

Blackstone v. Miller, 188 U. S. 189.

But if they had not established a business situs in California which would render them liable to California taxation, then they must necessarily have their situs at the domicil of the owner.

Anderson v. Durr, supra.

What then is required to establish a business situs in California? That question has been settled in numerous California cases. The physical presence of the securities in the state is not enough. They must be

"in the possession and control of a local agent who holds them for the purpose of transacting a permanent business, and of investing and reinvesting the

proceeds from the principal or interest in such manner that the property or credits came in competition with the capital of the citizens of the state in which the agent resides."

Mackay v. San Francisco, 128 Cal. 678.

Estate of Fair, 128 Cal. 607.

Stanford v. San Francisco, 131 Cal. 34.

Thus, in a recent case holding that solvent credits of a foreign corporation arising from sales on credit contracted through a sales agency within the state, were incidental to the business of the foreign corporation at its domicil, and not "property in" the State subject to taxation, the court said:

"If we may venture to formulate a general statement of this modification of the rule" (*mobilia sequuntur personam*), "it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicil, so that the substantial use and value primarily attach to and become an asset of the outside business. *In other words, while the non-resident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof.*"

Westinghouse Electric and Mfg. Co. v. Los Angeles Co., Cal. 205 Pac. 1076.

Thus, a general deposit to the credit of a domestic corporation in a bank in another state is subject to taxation at the domicil of the corporation as being present in California.

Pacific Coast Sav. Society v. San Francisco, 133 Cal. 14.

Securities physically absent from the state are taxable in the state as present there when the owner is there, when they are not being used in some business in the state in which they are physically present.

Mackay v. San Francisco, supra.

Estate of Fair, supra.

It is submitted that all that is necessary, under these authorities, to show that the securities in the case at bar had no taxable business situs in California under California law is to examine the facts set forth in the Submission (Record, pp. 7-8). All that is there shown is that the securities were purchased and held by Welch & Co. in California for Ewa. There is nothing to show that the purchase and holding were not a purely ministerial agency. It was exactly the sort of thing that is done many hundred times a year in Hawaii by a large number of citizens,—the writing to a broker of instructions to buy certain securities, and hold them until further orders are received, either to forward the same to Hawaii, or to sell them. It is true in this case, that the securities were not forwarded to Hawaii, but were sold,—apparently from the Submission, *not* by Welch & Co.—but that does not transmute the transaction from one of pure brokerage to one where the securities were utilized in a California business so as to bring the credits into competition with the capital of the State and give them a business situs there. Their situation remained exactly the same as though Ewa had forwarded a check to some San Francisco broker

with instructions to purchase these securities; had then had them forwarded to Hawaii, and later had sent them back to a California broker and had them sold.

There was, from the Submission, apparently no general agency in Welch & Co. with regard to these securities; it is not even shown that the California concern had authority to cut the coupons and collect the interest, or that it did so, much less to invest the interest or to change the capital investment, and re-invest, with a general control over the investments. It is submitted, therefore, that there is nothing to distinguish this from an ordinary brokerage transaction, and that the California authorities themselves decline to stamp these securities with a business situs in California.

THE CASES CITED BY PLAINTIFF-IN-ERROR ANALYZED.

The cases cited by plaintiff-in-error to establish the proposition that the securities before the court had a business situs in California fall roughly into two classes; those that are irrelevant; and those that declare that the maxim *mobilia sequuntur personam* yields to the fact of *actual control* elsewhere,—that is, such a localization of the securities in the business of the foreign state that they enter into competition with the capital employed in business in that state by its own citizens. With this last proposition, the Territory has no particular quarrel, if it be determined by the court that the maxim is

not what is contended by the Territory,—a rule of law variable only by specific legislation. We have attempted heretofore to show,—and shall later deal with the problem again,—that even under the cases on this last point cited by plaintiff-in-error, there is always present that element of localized general control, the power to invest and reinvest at the discretion of the agent, that at once distinguishes the cases cited from the case at bar, where there was only a “deposit” (Record, p. 7) of the securities in California.

CASES CITED BY PLAINTIFF-IN-ERROR WHICH ARE NOT IN POINT.

On the proposition that the taxable situs of notes, bonds, mortgages and the like, being in themselves property, is, in the absence of express statutory direction, the place where they are found, plaintiff-in-error, cites a number of cases. The first three are Kansas cases. Of *Blain v. Irby*, 25 Kan. 499, it is sufficient to say that this case did not deal with the proposition at all, and merely referred with approval in passing to the other two Kansas cases cited by Ewa, *Wilcox v. Ellis*, 14 Kan. 588, and *Fisher v. Commissioner of Rush County*, 19 Kan. 414.

The Territory is perfectly content to submit these cases to the court with the interpretation given them by recent Kansas cases. For instance, *Johnson County v. Hewitt*, 76 Kan. 816, 14 L. R. A. (N. S.) 493, cited by plaintiffs-in-error on what constitutes a

business situs,—and which the Territory will cite in support of its own contentions, later,—says:

“Although much confusion still exists, legal thought upon the subject of the taxation of intangible property has been considerably clarified since the opinions in *Wilcox v. Ellis*, and *Fisher v. Rush County* were written, and many of the arguments there advanced would now be regarded as unsatisfactory.”

In the very recent case of *Kimball Co. v. Shawnee County*, 99 Kan. 302, where the Court held that the maxim applied except where modified by the Legislature, the case of *Fisher v. Rush County* was again referred to as having been twice disapproved by the Kansas court.

In the case of *Poppleton v. Yanhill*, 18 Ore. 377, the decision of the court was based upon the interpretation of the local statute. The question was whether notes and mortgages for money loaned in Washington, and which were held in Washington by an agent were taxable in Oregon. The court said:

“Section 2731, Annotated Code provides that ‘the terms ‘personal estate’ and ‘personal property’ shall be construed to include all household furniture, goods, chattels, money and gold dust on hand or on deposit, either within or without this state; all boats or vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage or otherwise,’ which is the only provision from which it could possibly be inferred that the property in question might be taxable in this State * * *. The clause relating to debts due or to become due, etc., was evidently intended to include domestic debts only, as it does not declare, like the

other two clauses, that it includes debts due from parties 'either within or without this State' or 'at home or abroad,' or contain terms of equivalent import. *Leaving out of the latter clause the qualifying words referred to, after having inserted them in the two former ones, would indicate, on the part of the Legislature, an intent not to include debts due from parties living out of the State* as 'personal property' or 'personal estate,' and authorize the construction indicated. The first clause of the section would include property like that in question, if it had not limited the construction to articles 'on hand or on deposit.' The property in question was neither 'on hand or on deposit,' but was in the hands of the appellant's agents in Washington Territory, invested by them and under their control."

In *People ex rel Jefferson v. Smith*, 88 N. Y. 576, the decision was based upon a construction by the court of various statutes indicating an intent on the part of the Legislature to change the rule that personalty follows the domicil of the owner. In arriving at that conclusion, the court considered Revised Statutes, as amended by Chapter 176, Laws 1851, where it was provided that every person shall be assessed where he resides for all personal estate owned by him, *including all personal estate in his possession or under his control*; Chapter 371, Laws 1851, where it was provided that *all debts owing by residents to non-residents of the United States for purchase of real estate were personal property to be taxed where the debtor resided*; Chapter 37, Laws 1855, where all persons and associations doing business * * * in New York and not residents were to be assessed and taxed on all sums invested in any

manner, just as if they were residents; Section 428, Code of Civil Procedure, where it was provided that *a debt evidenced by a bond, promissory note, or other instrument for payment of money, whether the debtor was resident or non-resident, should be regarded as personal property as the place where the instrument was found*, for the purpose of giving jurisdiction to the Surrogate.

It is submitted that these cases, in which the maxim was departed from under the construction of local statutes indicating that the legislature had intended to supplant the rule, are not authorities in the present case.

In the two Kentucky cases of *Commonwealth v. West India Oil Refining Co.*, 129 S. W. 301, and *Commonwealth v. Avery*, 174 S. W. 519, cited by plaintiff-in-error, the decision was directly based upon the fact that the property could be taxed outside of the state, and therefore the jurisdiction of Kentucky to tax did not exist. The Territory believes that it has demonstrated that the securities in the case at bar were not taxable in California, but if they were, the ruling of the Kentucky court is one which the Supreme Court of the United States has repeatedly decline to make.

Anderson v. Durr, supra.

Hawley v. Malden, supra.

Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54.

Union Transit Co. v. Kentucky, supra.

Blackstone v. Miller, supra.

IN ALL OF THE CASES CITED BY THE PLAINTIFF-IN-ERROR WHERE THE MAXIM MOBILIA SEQUUNTUR PERSONAM WAS DISREGARDED THERE WAS A COMPLETE BUSINESS CONTROL OF THE SECURITIES IN THE STATE FOREIGN TO THE OWNER'S DOMICIL, AND OFTEN SPECIFIC STATUTES CHANGING THE RULE.

In *Blackstone v. Miller*, 188 U. S. 189, the court held that a succession tax could be levied on certain intangible property *both* in the state where it was actually present, and in the state where the owner had lived and died.

In *New Orleans v. Stempel*, 175 U. S. 309, the statute of Louisiana expressly taxed the credits of non-residents, which were derived from business done in the State. The Court held that this was a legitimate exercise of state *power*, clearly indicating that the maxim should generally apply, but might be modified by express legislation. In referring to *State Tax on Foreign Held Bonds*, 15 Wall. 300, the court said:

“This last sentence, properly construed, is not to be taken as a denial of the *power* of the legislature to establish an independent situs for bonds and mortgages when those properties are not in the possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicil of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession.”

And again in referring to *Kirtland v. Hotchkiss*, 100 U. S. 491, as not being in conflict with the decision, the court said :

"There was no legislation attempting to set aside the ordinary rule in respect to the matter of situs."

Bristol v. Washington County, 177 U. S. 133, and *Re Jefferson*, 35 Minn. 215, may well be considered in connection with *People ex rel, Jefferson v. Smith*, supra, for all three of these cases dealt with the securities of Jefferson, a resident of New York until his death, which securities were held, and *managed* in Minnesota. The credits were under the full control of the Minnesota agent for collection, investment, and re-investment, and the Minnesota Court held that this fact, particularly in view of the fact that these very securities had been held exempt from taxation in New York, in the Jefferson case, supra, were taxable in Minnesota. The Supreme Court of the United States held that their taxation by Minnesota was permissible, particularly emphasizing the control of the agent in Minnesota over them.

In the case of *Board of Assessors v. Comptoir D'Escompte*, 191 U. S. 388, the power of the State of Louisiana to tax credits arising from business done in the state by a non-resident was before the court, the statute expressly covering such credits. The court held that it could be done, and said :

"From these cases it may be taken as the settled law of this Court that there is no inhibition in the Federal Constitution against the right of the State to tax property in the shape of credits where the same are evidenced by rates or obligations held with-

in the State, *in the hands of an agent of the owner for the purpose of collection or renewal with a view to new loan, and carrying on such transactions as a permanent business.*"

In *Union Transit Co. v. Kentucky*, 199 U. S. 194, the power of the State to tax rolling stock of a domestic corporation which rolling stock was permanently located outside the taxing state was under discussion. The court held that the cars could not be taxed, and said:

"Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way in which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases, the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such has been the repeated rulings of this Court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicil or the situs."

The case of *Liverpool, London & Globe Insurance Co. v. Board of Assessors for Parish of Orleans*, 221 U. S. 346, was another instance of the construction of the statute of Louisiana twice hereinabove referred to which taxed all credits arising from business done in the state by non-residents. The court again sustained the power of the State to do this and, quoting *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, said:

“We are not dealing here merely with a single credit or a series of separate credits *but with a business.*”

As to *Louisville & Jefferson Ferry Company v. Kentucky*, 188 U. S. 385, the Territory is content to allow the Supreme Court of the United States to dispose of it as an authority in the present case. In *Anderson v. Durr*, Adv. Ops., 42 Sup. Ct. 15, at 17, in holding that the Ohio Court was correct in taxing as personal property “in” Ohio, a seat on the New York Stock Exchange, even though that seat was also taxed in New York, the Ohio Court having declared that the property followed the person of the owner to his domicil in Ohio, the United States Supreme Court said:

“The asserted analogy to *Louisville & Jefferson Ferry Co. v. Kentucky*, supra, cannot be accepted. That decision related to a public franchise arising out of legislative grant, held to be an incorporeal hereditament in the nature of real property and to have no taxable situs outside the granting state. It did not involve the taxation of intangible personal property. See *Hawley v. Malden*, 232 U. S. 1, 11; *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 328.”

Finally, the case of *De Ganay v. Lederer*, 250 U. S. 376, is cited by plaintiff-in-error. *De Ganay v. Lederer* is certainly the strongest case which plaintiff-in-error has cited against the Territory's claim, but it is submitted that this case is distinguishable. In the *De Ganay* case, not only were the securities physically present in Pennsylvania, and had their source there as debts, but they were actively entered in business competition with the capital of citizens of the state, for they were under the fullest control of the American agent. The court there, after expressly referring to the authority of the agent in Pennsylvania to sell, assign, or transfer any of the securities, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal, said:

*"Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property within the United States * * *."*

It is submitted that there is the greatest distinction between this class of cases and the one at bar. In the cases cited by plaintiff-in-error, there was the fullest control of the credits and securities by an agent in the state foreign to the owner's domicil; the credits were localized in business and were subject to collection, sale, investment and reinvestment at the discretion of the agent; in the language of the California Court, the business in the state foreign to the owner's domicil "utilized and controlled in its own operation and maintenance the credits and in-

come thereof." (*Westinghouse, etc., Co. v. Los Angeles*, *supra*.)

Where was there such utilization and control of the securities here in question? There was none. They were merely purchased by Welch & Co. upon the order of the owners, and held by the California corporation as a naked depositary until, apparently again on the specific order of Ewa, they were sold. Here was no business, here was no collection, investment and reinvestment in competition with California capital and business. There was merely, in the words, of the Court in *Liverpool, Etc., Insurance Co. v. Board of Assessors*, *supra*, "a single credit," or at the most "a series of credits," and no business.

THE GRAND INGREDIENT IN "BUSINESS SITUS" IS CONTROL INDEPENDENT OF THE OWNER SO THAT THE SECURITIES ENTER INTO BUSINESS COMPETITION WITH THE CAPITAL OF THE CITIZENS IN THE STATE WHERE THE BUSINESS SITUS IS ESTABLISHED.

In the cases cited by the plaintiff-in-error, a business situs was held to have been established only when there was a local control of the securities,—a power to collect, sell, assign, invest and reinvest,—which brought the credits into business competition with the assets of the citizens of the State. In the absence of such control, there is no localization of the securities apart from the domicil of the owner;

the owner retains the business control of the securities, and their situs is necessarily at his domicil.

The Supreme Court of the United States has held that unless such local control exists, no business situs can be established.

“We cannot assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of the property within the state for taxation.”

Buck v. Beach, 206 U. S. 392, 406.

A rather recent Kansas case, cited by plaintiff-in-error, holding that securities in the State merely for the purpose of safe-keeping were not taxable in the state, but had their situs at the domicil of the owner, used the following language:

“A merely transitory presence in a foreign state, or *naked interest for safekeeping is not enough.*”

Johnson v. Hewitt, supra.

Kimball Co. v. Shawnee County, supra.

The control and use of the intangibles must result in what is, in effect, a separate business in the state foreign to the owner's domicil.

Westinghouse Electric & Mfg. Co. v. Los Angeles County, supra.

Where was the localized California control of the securities which would establish for them a business situs in California? The Submission (Record, p. 7) shows no competition with California capital. It shows nothing but the purchase,—under the specific order of Ewa, for all that appears,—of the securities,—and the possession of them,—still subject to

the orders of Ewa,—for purposes of safekeeping until they were sold. Even the sale does not appear to have been made by the California agent, or under its direction (Record, p. 7). It is submitted that nothing is established here but a “naked interest for safekeeping” in the California agent, which would have been equally well served by the deposit of these securities in any safety deposit vault. See *Johnson v. Hewitt*, supra. Surely, these circumstances do not establish a “business situs.”

THE SECURITIES IN QUESTION WERE PROPERTY OWNED IN HAWAII, AND SO SUBJECT TO TAXATION UNDER THE HAWAIIAN STATUTE.

Intangible securities follow the person of the owner, and are thus taxable at his domicil.

Thus a seat on the New York Stock Exchange is entirely under the control of the officers of the Exchange in New York, is taxable at the owner's domicil in Ohio, as being personal property “in” Ohio.

Anderson v. Durr, (Ohio), 126 N. E. 57, aff'd on certiorari (U. S.) Adv. Ops., 12 Sup. Ct. 15.

So, too, deposits in a bank in a state other than that of the owner's domicil are taxable at the owner's domicil.

Fidelity & Columbia Trust Co. v. Louisville,
supra.

Pacific Coast Savings Society v. San Francisco,
supra.

So stocks, bonds, mortgages, and other like securities are taxable at the owner's domicil though physically in another state.

Kirtland v. Hotchkiss, *supra*.

State Tax on Foreign-Held Bonds, *supra*.

Buck v. Beach, 206 U. S. 392.

Union Transit Co. v. Kentucky, *supra*.

Dwinnell v. Gaylord, 73 Wis. 316.

Estate of Fair, *supra*.

Mackay v. San Francisco, *supra*.

Johnson v. Hewitt, *supra*.

So, in the latest cases before the Supreme Court of the United States, both decided later than *De Ganay v. Lederer*, *supra*, on the taxation of intangible personal property, the Court has reaffirmed the doctrine that the general rule in such cases is that the property is to be taxed at the domicil of the owner.

Maguire v. Trefry, 254 U. S. 12.

Anderson v. Durr, *supra*.

But, of course, it is the contention of the Territory that these cases and all the others cited by the Territory are reconcilable with the *De Ganay* case, and others like it cited by plaintiff-in-error. The *De Ganay* case is different from the one at bar in that the securities there were in the absolute control for sale, assignment, investment, and reinvestment, of the agent in the United States. There was no such control in the case at bar, for here the agent in California had only a naked interest for safe-keeping. But even were this not true, the cases still do not conflict. The *De Ganay* case, and others of that variety, *did not hold that the securities were not also*

taxable, together with the income therefrom, at the residence of the owner also. Indeed, the Supreme Court of the United States in *Union Transit Co. v. Kentucky*, supra, and *Anderson v. Durr*, supra, must be taken to have established, not only that the income could be taxed by both California and Hawaii upon securities which might be regarded as in California by reason of having a business situs there, and as in Hawaii by reason of the maxim *mobilia sequuntur personam*, but that they would come within the term personal property "in" the place of the owner's domicil. (*Anderson v. Durr*, supra.)

It is respectfully urged upon the court that the Supreme Court of the United States has not held in any of the cases cited that intangibles are not in any event taxable at the domicil of the owner; that it has held repeatedly that they may be so taxed, even though they have acquired a business situs elsewhere, and are taxable at the place of the business situs (*Union Transfer Co. v. Kentucky*, supra, *Fidelity & Columbia Trust v. Louisville*, supra, *Anderson v. Durr*, supra); and finally that except where there is a localized general control apart from the residence of the owner, that they are not taxable save at the owner's domicil. (*Buck v. Beach*, supra.)

EVEN THOUGH THE SECURITIES HAD A BUSINESS SITUS IN CALIFORNIA SO AS TO BE SUBJECT TO TAXATION UNDER THE CALIFORNIA LAW, THEY WOULD STILL BE SUBJECT TO TAXATION IN HAWAII UNDER THE MAXIM *MOBILIA SEQUUNTUR PERSONAM*.

If the securities in question had acquired a situs for purposes of taxation in California they would still be taxable in Hawaii.

Anderson v. Durr, *supra*.

Union Transit Co. v. Kentucky, *supra*.

Blackstone v. Miller, *supra*.

Hawley v. Malden, *supra*.

Thus, in the Anderson case, the court held that a seat on the New York Stock Exchange was taxable at the domicil of its owner in Ohio, even though it had earlier held that a New York Stock Exchange seat was taxable as personal in New York (*Rodgers v. Hennpin County*, 240 U. S. 184).

In view of the authorities already cited to the effect that these securities would not be taxable in California, the Territory deems it not improper again to refer to the language of the Supreme Court of the United States in *Union Transit Co. v. Kentucky*, *supra*:

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the State of the domicil or the situs."

Does the De Ganay case declare that the intangibles taxable in the United States are not also taxable as being present in France? It does not. Neither do any of the other Federal cases cited. The only ones that do are the Kentucky cases, and we submit that those have followed a fallacious theory of law that

has been repeatedly rejected by the Supreme Court of the United States in no uncertain terms.

THE FEDERAL COURT SUSTAINS LOCAL TAXATION WHEREVER POSSIBLE.

The Territory has already cited many authorities to the effect that this Court will sustain the ruling of the Territorial Supreme Court in construing the local tax statute, if that be at all possible.

But it is interesting to note how earnest has been the effort of the United States Supreme Court in cases cited by plaintiff-in-error to make no ruling that would exempt a large body of property from the taxation of the local government. Although the situation in a case arising in the territory and in a case arising in a state is quite different in the power of the reviewing court to reverse, yet the expediency of leaving the local construction of a tax law as the last word has been recognized in territorial as well as in state cases. It is, then, with a view to considering the attitude of the United States Supreme Court in sustaining local taxation that the Territory quotes the following:

“When the question is whether property is exempt from taxation, and that exemption depends alone on a true construction of a statute of the State, the Federal courts should be slow to declare an exemption in advance of any decision by the courts of the State. The rule in such a case is that the Federal courts follow the construction placed upon the statute by the State courts, and in advance of such construction, they should not declare property exempt from taxation unless it is clear that such is the fact. In other words, they should not release any property

within the State from its liability to State taxation unless it is obvious that the statutes of the State warrant such exemption, or unless the mandates of the Federal Constitution compel it."

New Orleans v. Stempel, supra.

Board of Assessors v. Comptoir National D'Escompte, supra.

It is true that the Federal Court is not bound by the decision of the territorial court on a tax statute, as it would be by the decision of a state court. But it is submitted that the same logic should require an equal reluctance in this court to exempt property in a territory from taxation, as would apply were a state tax law involved, particularly when the local law has already been held by the local court to render the property in question subject to taxation.

IF THE CONCLUSION REACHED BY THE SUPREME COURT OF THE TERRITORY IN THE INTERPRETATION OF THE HAWAIIAN TAX STATUTE, AND ITS APPLICATION TO THE RETURN AND ASSESSMENT OF EWA PLANTATION, IS NOT SUCH AS MIGHT HAVE BEEN REACHED BY THIS COURT HAD THE MATTER BEEN BEFORE IT FOR AN INITIAL DETERMINATION, YET IT IS NOT SO CLEARLY ERONEOUS AS TO RENDER NECESSARY A REVERSAL.

The Territory believes that the judgment of the Supreme Court of Hawaii in construing the strike receipts and the income received from intangibles present in California by Ewa Plantation Company

as falling within the taxation statutes of Hawaii was correct.

But were there some ambiguity in the statute; were the construction of and the conclusion arrived at by the Supreme Court of Hawaii, regarded with disfavor by this Court, as a conclusion that the members of this Court would have avoided had the matter come before them for its initial determination, still there is no such clear and obvious error as would justify this Court in disregarding the local construction of a local statute.

Copper Queen Mining Co. v. Board of Equalization, supra.

CONCLUSION.

The Territory urges that the strike receipts were clearly taxable for the year 1920 as income under the Hawaiian statute; that the return by the taxpayer of its contribution to that very fund as an expenditure chargeable wholly to 1920 is conclusive against the taxpayer's contention that the receipts should be charged as income for three separate taxation years; that the court will not disregard the plain terms of the taxation statute in order to permit the taxpayer to keep its books under any particular system, particularly when the system is inconsistent with the facts; that the Federal Court will be loath to overturn the local construction of a

local tax law; and that the judgment of the Supreme Court of the Territory of Hawaii should therefore be affirmed.

The Territory further urges that the income on the bank deposits, bonds and notes held in California was properly taxable as derived from property owned in Hawaii; that the maxim *mobilia sequuntur personam* applies in Hawaii except where modified by specific legislative enactment; that this Court should be governed by the interpretation of the Territorial Supreme Court in the case at bar of the early Hawaiian tax decisions; that even if a business situs may be established to vary the maxim, that it can only be done by a full and complete control apart from the domicil of the owner; that a naked deposit for safekeeping is not enough to establish a business situs; that the intangibles here involved have been shown as subject to no such control outside of Hawaii as would give them a business situs apart from the domicil of the owner; that in particular no business situs has been established that would be recognized by the California law; that even if the credits had a business situs in California, they would still be "in" Hawaii for purposes of taxation; that the Federal Court will be extremely loath to overturn the construction of the Territorial tax statutes by the Territorial Supreme Court, and particularly loath to do so in order to exempt a large class of property from taxation; and that the judg-

ment of the Supreme Court of the Territory should therefore be affirmed.

Respectfully submitted,

**TERRITORY OF HAWAII,
Defendant-in>Error.**

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